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Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Appellants,

vs.

LEONARD PAUL HODORY,
Appellee.

ON DIRECT APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Jurisdictional Statement

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JURISDICTIONAL STATEMENT

This case is on appeal from a decision of a three judge United States District Court for the Northern District of Ohio, Eastern Division declaring that Section 4141.29(D)(1)(a) was unconstitutionally applied in denying unemployment compensation benefits to Leonard Paul Hodory and those similarly situated.

OPINIONS BELOW

The three judge Court's Memorandum Opinion and Order issued March 4, 1976 styled below as case no.

C75-15Y and Order of March 6, 1976 granting a stay of the injunction are not officially reported to date. A copy of each of the Orders and Opinion is attached to this jurisdictional statement.

GROUNDS FOR JURISDICTION

Plaintiff's Complaint in an action entitled Leonard Paul Hodory v. Ohio Bureau of Employment Services and Albert G. Giles, challenged the constitutionality of Section 4141.29(D)(1)(a) asking that its application be enjoined as being in conflict with the Federal Society Security Act and Amendment XIV of the United States Constitution pursuant to 28 U.S.C. Section 1343 (3) and (4) and 42 U.S.C. 1983. A three judge district court was convened under authority of 28 U.S.C. Sections 2281 and 2284. By Order entered on March 4, 1976 the United States District Court for the Northern District of Ohio found the statute unconstitutional as applied to the plaintiff and those similarly situated and enjoined its enforcement. On March 26, 1976 Attorney General William J. Brown filed a Notice of Appeal in the United States District Court for the Northern District of Ohio, Eastern Division. On April 6, 1976 the three judge district court entered a Motion for Stay Order pending the outcome of the appeal.

This court has jurisdiction to consider this appeal under 28 U.S.C. 1253. *Radio Corp. of America v. U.S.*, 96 F. Sup. 660, District Court (Illinois) affirmed 341 U.S. 412, 71 S. Ct. 806; *Brotherhood of Locomotive Engineers v. Chicago R.I. and P.R. Co.*, 382 U.S. 423; *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 8 S. Ct. 568; *Loeb v. Trustees of Columbia Township*, 179 U.S. 472, 21 S. Ct. 174.

STATUTE INVOLVED

The validity of the following section of the Ohio Revised Code is involved in this appeal. Section 4141.29 (D)(1)(a):

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged in the dispute, or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

Section 4141.29 is set forth in its entirety in the appendix, page 34.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Is Ohio's labor dispute disqualification as in effect at the time of the labor dispute in question in conflict with the Federal Social Security Act?

(2) Can a state system of Unemployment Compensation predicate disqualification from benefits on grounds other than fault?

(3) Was there a suitable governmental interest underlying the Ohio "Labor Dispute" disqualification as in effect at the time of the strike such that Section 4141.29(D)(1)(a) was not unconstitutional as applied to Leonard Paul Hodory and those similarly situated?

(4) Is the decision of the Three Judge District Court in conflict with other jurisdictions and against the weight of authority?

(5) Does the decision of the Three Judge District Court deprive the respective employers of their substantive and procedural due process rights under the 5th and 14th Amendments?

STATEMENT OF THE CASE

This case involves the constitutionality of Section 4141.29(D)(1)(a), Ohio Revised Code, which contains essentially the same language as the original statute enacted in 1936. Several amendments to the statute have been made for clarification purposes, but the wording contained in (D)(1)(a) has been in effect since 1963.

This section disqualifies a claimant from receiving unemployment benefits when he becomes unemployed due to a labor dispute other than a lockout at any

factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed. An individual is disqualified in cases where his unemployment is caused by a labor dispute at another place, either within or without this state, if owned or operated by the same employer and which supplies materials or services necessary to continue the operation of the individual claimant's last place of employment.

Plaintiff-appellee was one of more than twelve hundred fifty steelworkers furloughed by United States Steel Corporation and Republic Steel Corporation as a result of a national strike by the United Mine Workers at coal mines owned and operated by both steel companies. These company owned mines supplied fuel for the operation of the various facilities engaged in the manufacturing of steel products owned and operated by U.S. Steel Corporation and Republic Steel Corporation in Ohio which were forced to shut down due to the lack of fuel.

A large number of other steel workers employed by U.S. Steel Corporation and Republic Steel Corporation at other Ohio facilities were also affected by the strike, and perfected their appeal to the Ohio Bureau of Employment Services pursuant to Section 4141.28, Ohio Revised Code. The Bureau, upon hearing evidence from all concerned parties, granted benefits to these employees on the basis that the company owned coal mines did not supply a sufficient amount of fuel to effect a plant shut down. The Steel companies are appealing these decisions in the state courts.

Plaintiff-appellee and his co-workers filed applications for unemployment benefits with the Ohio Bureau of Employment Services which were disallowed for the

reason that the labor dispute at the coal mines owned and operated by United States Steel Corporation was the cause of the claimant being unemployed. The decision of the Ohio Bureau of Employment Services wherein the plaintiffs-appellees were disqualified from receiving benefits was consistent with previous Bureau and Board of Review decisions, case law in Ohio as stated in *Cornell v. Bailey*, 163 Ohio St. 50, 25 N.E. 2d 323 (1955) and *Adamski v. Bureau of Unemployment Compensation*, 108 Ohio App. 82, 155 N.E. 2d 518 (1959) and in other states having the same or similar disqualifications. *Abernathy v. Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963) Certiorari denied, U.S. Sup. Ct. 375 U.S. 161 (1963); *Spielmann v. Industrial Commission*, 236 Wis. 240, 295 N.W. 1 (1940); *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941). These appeals are now pending before the Board of Review but are being stayed pending a final decision in this case.

Plaintiff-appellee, during the pendency of his appeal in the state administrative process, filed this class action against the Ohio Bureau of Employment Services and Albert G. Giles, Administrator, on behalf of himself and all others similarly situated in the United States District Court, Northern District of Ohio, Eastern Division pursuant to 42 U.S.C. Section 1983 seeking declaratory and injunctive relief on the grounds that Ohio Revised Code, Section 4141.29(D)(1)(a) was unconstitutional on its face and as applied, violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 303(A)(1),(3) of the Social Security Act of 1935, as amended, 42 U.S.C. Section 503(A)(1),(3).

Plaintiff-appellee did not name as defendant his employer, United States Steel Corporation, Ohio Works, Youngstown, Ohio nor did he name as defendants the other United States Steel Corporation facilities or Republic Steel Corporation, employers of the class which plaintiff-appellee alledged to represent, and whose financial interests would be substantially affected by any decision in this case.

Ohio Revised Code, Section 4141.28(O) mandates that all interested parties be named appellees in any state proceeding in order for each party to protect their respective interests. United States Steel Corporation and Republic Steel Corporation both have a substantial financial interest in the instant case because it is their respective accounts that will be affected as a result of a final decision in this case.

This case proceeded as a class action and upon motion by Plaintiffs-appellees, the United States District Court convened a three judge panel to determine the constitutionality of Section 4141.29(D)(1)(a), Ohio Revised Code.

Defendant's-appellants' opposition consisted of the following:

(1) The case is not a proper case for a three judge district court in an action for an injunction for money damages
(2) Plaintiffs-appellees failed to exhaust their remedy at law
(3) Plaintiff Hodory and his co-workers had a pending appeal before the Board of Review, Ohio Bureau of Employment Services
(4) Plaintiffs-appellees failed to meet the requirements of Federal Rules of Civil Procedure, Rule 23(b)(3)

(5) The unemployment compensation laws in Ohio are solely the state's concern and have not been preempted by the Federal Government.

(6) The U.S. District Court should abstain from hearing the case on the basis of (a) comity and (b) Plaintiff-appellee was already in litigation on the issues of entitlement to benefits before the Board.

Briefs were submitted and oral arguments were heard by the three judge panel on the above issues. No evidentiary hearing was held to submit evidence on the merits or evidence presented to show the impact on the unemployment fund and employer's accounts nor the special interests of the defendants. Neither U.S. Steel Corporation or Republic Steel Corporation, the employers, were parties to this action.

The three judge court issued its Memorandum Opinion and Order on March 5, 1976 (Appendix 48) wherein the court held:

(1) Abstention would not be proper in this case (Opinion p. 5)

(2) The prerequisites to certification of a class action under 23(a) have been met. (Opinion p. 6)

(3) Defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. (Opinion p. 10)

(4) Section 4141.29(D)(1)(a) as applied violated plaintiff's rights under the Equal Protection Clause of the 14th Amendment and the rights guaranteed by 42 U.S.C. Section 1983. (Opinion p. 11)

Final judgment was entered May 5, 1976 (Appendix 61). Defendants' Motion for a Stay Order, pending

this appeal was granted on April 6, 1976 (Appendix 62).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. THE CLASSIFICATIONS RESULTING FROM OHIO'S "LABOR DISPUTE" DISQUALIFICATION AS IN EFFECT AT THE TIME OF THIS LABOR DISPUTE ARE SUPPORTED BY REASONABLE AND SUBSTANTIAL BASES AND FURTHER A SUITABLE GOVERNMENTAL INTEREST.

Any examination of a state labor dispute disqualification must begin with an examination of its statutory history. The Ohio unemployment compensation insurance laws, like the laws of many of the other states, were patterned after the British law first adopted in 1911. (National Insurance Act, 1-2 Geo. V. Ch. 55 (1911)). At the outset, the administrators of the British unemployment insurance laws maintained an official position of "neutrality" with respect to unemployment which occurred as a result of a labor dispute. Under the English law, the cause of the dispute and the merits of the dispute were immaterial. If unemployment was the result of a labor dispute, it was not compensable. Historically, two reasons have been furthered for the English law: (1) it was considered unwise to permit the fund to be used to subsidize workers unemployed because of a trade dispute, (2) to protect the unemployment fund from being depleted by the payment of benefits under circumstances not contemplated by the insurance coverage. The English law, like the Ohio law was designed to pay benefits when unemployment was due to "fluctuations in trade." (See Hughes, Principals Underlying Labor-Dispute Dis-

qualification, p 2 (1946); Report of Committee on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Session (1935)). An examination of the history of the labor dispute disqualification when considered in the light of the fact that the unemployment tax rate is based upon a finite, legislatively determined level of risks, leads to the conclusion that Hodory and those similarly situated are simply not "covered" by the Ohio "policy" of unemployment insurance.

Ohio's General Assembly in enacting the statute that was in force at the time of the labor dispute did not charge a high enough rate to support coverage of this class of workers. It is apparent that there were several state interests served by the legislature's decision to exclude those persons situated like Hodory. Like the British law the Ohio law recognized that there was certainly a state duty to remain neutral in labor disputes. So strong is this policy that it has been codified in the National Labor Relations Act. On October 1, 1975 the United States District Court, District of Hawaii in *Hawaiian Telephone Co., v. State of Hawaii Department of Labor and Industrial Relations*, Civil No. 74-140 struck down a state statute that allowed the payment of unemployment compensation benefits to workers unemployed due to a labor dispute. Certainly if the policy of "state neutrality" is strong enough to warrant the negation of a state statute, it ought to be *at least* sufficient to support a state statute denying such benefits.

The second rationale of the British law is also equally applicable to the Ohio law. The British rationale was to protect the unemployment fund against having to pay for uninsured risks. This rationale has been upheld as a valid state interest by this court in

Geduldig v. Aiello, 417 U.S. 484, 94 S. Ct. 2485 (1974) hereinafter cited as *Geduldig*. In that case as in the instant case the underlying program of unemployment insurance was designed to function in accordance with insurance concepts. In that case, as in Ohio, the system was designed to be self-sufficient by maintaining an equilibrium between the insured risks and the amount of "premium" contributed to the fund. In *Geduldig*, *supra*, as in the instant case, the plaintiff complained of a denial of equal protection because of the alleged "underinclusiveness" of the set of risks that the state had selected to insure. In that case this court recognized that there was no constitutional necessity for insuring against all possible risks, and that "the legislature may select one phase of one field and apply a remedy there neglecting the others" (*Geduldig*, *supra*, at 495 quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)). This court continued to state that this was particularly true of social welfare programs, so long as the line drawn by the state is rationally supportable. "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all". *Dandridge v. Williams*, 397 U.S. 471, 486-487 (1970). In *Geduldig*, *supra*, at 496 this Court recognized that there were legitimate state interests in maintaining a level of "insurance" that would not escalate the contributions required to support the system, and that there was a valid interest in maintaining the self-supporting nature of the State's unemployment insurance program. At this point it is significant to note that while Ohio's system of unemployment insurance is self-sufficient, other states having laws that allow the payment of benefits

to individuals in the Hodory classification have been forced to borrow money from the Federal Government. Such states will borrow an estimated 1.9 billion dollars from the Federal Government in 1976 alone, and have borrowed $3,007.2 billion as of April 15, 1976. In *Geduldig*, *supra* at 496, this court held that "These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has."

In addition to neutrality and the state interests upheld in *Geduldig*, *supra*, the State of Ohio has the additional interest of protecting its business economy from the crushing impact of the District Court decision.

Over the years the State of Ohio has sought to provide the widest possible coverage that would be economically feasible for small businesses as well as large corporations. The judicial expansion of this coverage coupled with the new appeals on old claims that will result from the District Court's decision will not only force the State to borrow, at interest, from the Federal Government, but will cause a sharp rise in every employer's contribution rates for years to come. Considering that the district court's decision will provide a basis for new actions on old claims against employers that may no longer be doing business in the State of Ohio, the result will be to overburden its "Mutualized" Account, which is the general miscellaneous fund into which all Ohio employers must pay in order to cover those instances in which an employer's positive balance drops below zero.

There is a further state interest in not extending unemployment coverage to the unemployed non-striking employee in that the possibility of collusion between those participating in a dispute and those not

participating would make the process as administered and budgeted for, at the time of this labor dispute unworkable and vulnerable to fraud.

The classification of workers situated like Hodory who have been denied benefits is thus supported by substantial governmental interests.

B. THE OHIO SYSTEM OF UNEMPLOYMENT COMPENSATION IS NOT IN CONFLICT WITH THE FEDERAL SOCIAL SECURITY ACT.

The plaintiff in the proceeding before the Three Judge District Court argued that the Ohio Unemployment Compensation System, as in force at the time of the labor dispute in question, was in conflict with 42 U.S.C. Section 503(a)(1). The plaintiff's argument failed to take into consideration several important factors. Historically, the Federal Social Security Act as enacted on August 14, 1935 and as amended since that time contains no provision or restriction addressed to the states concerning the type of employment that must be covered or the types of conduct that can give rise to disqualification. Rather, the act has provided that the employers in the states that have enacted unemployment compensation laws can receive a credit against the Federal Unemployment tax for the amount of state tax paid. In *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937) and *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), this court considered the relationship between state systems of unemployment insurance and the Federal Social Security System in terms of the coverage afforded. This court concluded that the administration of the state's system of Unemployment Compensation was a function of the police power of the state and that

each state could select for its citizens that system which would best serve their local needs. This reflected the feelings of President Roosevelt who professed that so long as state systems of Unemployment Compensation conformed with the requirements of the federal act, the administration of the unemployment insurance funds and the determination of eligibility of claimants should be left in the hands of state executive and judicial instrumentalities (H.R. Doc. No. 81, 74th Cong., 1st Session VI (1935)). This philosophy is grounded both upon Tenth Amendment considerations and upon the belief that economic situations are at least in some respects related to geographic considerations and that the type of system appropriate for one state would not be adequate for another, as where one state may be industrial and another agrarian.

As recently as 1969 the United States Congress has rejected proposals that Congress draft legislation concerning employee eligibility and disqualification for Unemployment benefits. Chairman Mills stated that this was an area left to the states and that they should be "given the latitude to enable them to write the type of program that they want" (115 Cong. Rec. 34106, 1969). The Preface to the "Comparison of State Unemployment Insurance Laws" U.S. Department of Labor (1972) V. C. Hodgson, Secretary, begins by saying at page iii:

> "In the Federal-State system of unemployment insurance established in this country under the Social Security Act, the individual states have been free to develop the particular program that seems best adapted to conditions prevailing within the state. Consequently, no two State laws are alike".

The State of Ohio has, pursuant to this authority, chosen to enact legislation disqualifying those who are unemployed due to a labor dispute. In so doing they have excluded not only those actually picketing, but also those who are idled because of the dispute, when that dispute occurs at a location functionally integrated with the employee's place of employment. It was, and is, within the police power of the State of Ohio to so legislate. (See *Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Industrial Relations, et al.*, United States District Court, District of Hawaii, Civil No. 74-140, 10/1/75). It is significant to note that the Ohio Act has been certified as acceptable by the Secretary of Labor as in conformity with the Federal statutes. Surely the Ohio Act would not have been certified if the labor dispute provision were of doubtful constitutionality. (See Appendix 69).

C. A STATE SYSTEM OF UNEMPLOYMENT COMPENSATION MAY PREDICATE DISQUALIFICATION FROM RECEIVING BENEFITS UPON ANY REASONABLE BASIS.

The plaintiff and the three judge district court have both erroneously contended that the disqualification from receiving unemployment benefits can be predicated only upon "fault" (See Memorandum Opinion and Order, p. 8, Appendix 48).

Unemployment Compensation benefits are paid where a risk that has been insured against comes to fruition. In deciding what risks are to be insured against, the state legislature has broad discretion (See *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937), hereinafter cited as *Carmichael*). This discretion is necessary because economic and employment condi-

tions vary from jurisdiction to jurisdiction and according to geography.

In *Matter of Heitzenrater*, 19 N.Y. 2d 1 (1966) at page 7 Judge Fuld in discussing whether a labor dispute disqualification should be based on "fault" said that "fault" is not a "meaningful concept" when applied to the labor dispute disqualification because it tends to vest in the officials of an unemployment system, the power to decide questions of labor relations better left to Federal and State arbitrators.

The system of coverage and disqualification proceeds upon various other factors not limited to either fault or voluntariness. (See *Speilmann v. Industrial Commission*, 236 W 13, 240, 295 N.W. 1) There are entire industries that are not within the coverage of the unemployment insurance compensation system, yet it has been held that such exclusion is constitutional (*Carmichael, supra*). Under the Ohio law agricultural workers are excluded from coverage under Ohio Revised Code Section 4141.01(B)(3)(a), as are some commissioned salesmen under Ohio Revised Code 4141.01(B)(3)(g) and independent contractors under Ohio Revised Code 4141.01(B)(1)(b). While school teachers out of work over lengthy school vacations are denied benefits for those months, certainly, no one would argue that there is "fault" inherent in the profession of teaching. Individuals that are laid off from covered employment, who are sick or hospitalized, are denied benefits because they are not actively seeking work (see Ohio Revised Code Section 4141.29(A)(4)). All individuals who apply for unemployment benefits are denied payment for their first waiting week (4141.29(B)), yet this is certainly not a fault disqualification. Individuals who are forced to retire are

in many instances disqualified. Finally, extended benefits are available to an unemployed worker only in states having a certain percentage of the total workforce unemployed or having what is called an "on indicator". (Section 4141.301). Clearly, there is no blackletter formula for disqualification, rather, there are conditions and circumstances which the State legislature has elected not to compensate. Although "fault" may be one of these conditions, as is voluntariness of unemployment, there are, within the appropriate sections of the Ohio Revised Code, other equally valid non-fault criteria as stated above.

In *Carmichael, supra* at 519 this court said

> "What we have said as to the validity of the choice of the subject of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt, (citations omitted), or where it is most practicable to deal with it, (citations omitted), it may exclude others whose need is less, (citations omitted), or whose effective and is attended by inconvenience which is greater (citations omitted)."

D. THE DECISION OF THE THREE JUDGE DISTRICT COURT WILL DENY U.S. STEEL AND REPUBLIC STEEL OF THEIR SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

It was the understanding of both parties in the Court below that the issue before the Three Judge District Court concerned the propriety of class certi-

fication, the adequacy of notice to the class members, and the necessity for a three judge district court. When the court proceeded to decide not only those matters but also the merits of the case, the employers, U.S. Steel and Republic Steel were denied an opportunity to appear and present evidence bearing upon the economic effect of paying benefits (See *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115 (1974)). This coupled with the fact that neither employer has as yet been permitted to intervene or present amicus briefs constitutes a denial of procedural due process. The employers in this case stand to lose substantial sums of money over the next few years if their account is charged as directed by the district court.

Unlike other forms of social legislation, Ohio's system of Unemployment Compensation is not funded from the General Revenue nor does it depend upon employee contributions; rather, it is funded *in toto* by the *employer*. The amount that each employer must annually contribute is calculated based upon his "experience rating". The "experience rating" refers to the relationship existing between the "positive" or "negative" balance in an employer's account with the state, compared to the number and amount of the charges against it when viewed over a period of time as set by state statute.

When there are charges against an employer's account because of the payment of unemployment benefits to his employees, the balance in the employer's account necessarily decreases. When this balance drops below a certain sum, the employer's tax rate for the next ensuing year is increased to offset the deficit. By being denied an opportunity to intervene, U.S.

Steel and Republic Steel are being deprived not only of their favorable experience rating, which is part of the goodwill assets of their business, but of the money that will be required in future years to recoup their lost level of positive balance.

The involvement of the Three Judge District Court constitutes a denial of substantive due process in that there is no procedure by which a Federal Court may engage in the legislative function of establishing tax rates. Each specific unemployment tax rate classification used in connection with experience ratings is determined by the state legislature based upon the contemplated scope of the state's Unemployment insurance coverage. Each rate contemplates a certain level of statutory disqualification. The judicial elimination of a disqualification disturbs this balance and necessitates a higher tax in order to pay the benefits available under the judicially broadened statute. This is tantamount to a judicially ordered increase in taxation, which violates the statutory mandate that the tax be established by the legislature. The District Court's decision thus attempts to do what even the Federal Social Security Administration has not chosen to do, in that it attempts not only to determine who will receive unemployment benefits, but at which rate the employer will be taxed. This is in violation of the Tenth Amendment of the United States Constitution.

Further, this is an area in which the court should not attempt to substitute its judgment for the judgment of the legislature. Debatable questions in respect to the reasonableness of legislation enacted pursuant to the state police power are not for the court but for the legislature. (See *Sproles v. Benford*, 286 U.S. 374, 52 S. Ct. 581 (1932)).

E. THE DECISION OF THE THREE JUDGE DISTRICT COURT IS IN CONFLICT WITH THE DECISIONS OF OTHER JURISDICTIONS AND AGAINST THE WEIGHT OF LAW AND AUTHORITY.

The decision of the three judge district court is in direct conflict with the following State and Federal statutes and case law. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 57 S. St. 868 (1937), *W. H. H. Chamberlin, Inc. v. Elmer F. Andrews, Industrial Commissioner of the State of New York*, 271 N.Y. 1, 299 U.S. 515 and 301 U.S. 714 (1937), *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937), *Geduldig v. Aiello*, 417 U.S. 484, 94 S. Ct. 2485 (1974), *Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Industrial Relations*, United States District Court, District of Hawaii, Civil No. 74-140, 10/1/75, *Spielmann v. Industrial Commission*, 236 Wisc. 240, 295 N.W. 1 (1940), *Chrysler Corporation v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941), *Cornell v. Bailey*, 163 Ohio St. 50, 125 N.E. 2d 323 (1955) and Sections 7 and 8 of the National Labor Relations Act (29 U.S.C. Sections 157-158), *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959), *Abernathy v. Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963).

CONCLUSION

It is submitted that the questions raised in this appeal are substantial.

It is further submitted that Section 4141.29(D)(1)(a) of the Ohio Revised Code is not in conflict with the Federal Social Security Act.

It is further submitted that Section 4141.29(D)(1)(a) has not been applied in an arbitrary or invidious manner and does not deprive the plaintiff below and those similarly situated of their Due Process and Equal Protection rights under the United States Constitution.

It is further submitted that there is a substantial governmental interest in, and reasonable basis for, the application of Section 4141.29(D)(1)(a) to the plaintiff Hodory and those similarly situated.

It is further submitted that the decision of the three judge district court was contrary to the weight of authority.

It is further submitted that the decision of the three judge district court denies the employers U.S. Steel and Republic Steel of their Due Process rights under the United States Constitution.

For the reasons set forth in this appeal and the cases previously decided by this Court and by the courts of the several states, the appellant moves this court to grant plenary consideration of this case or, in the alternative, either to reverse the decision of the three judge district court or reverse the decision of the three judge district court and remand for further evidentiary hearings.

SECTION 4141.01(I), OHIO REVISED CODE

(I) "Interested party" means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code.

SECTION 4141.01(B)(1)(b), OHIO REVISED CODE 4141.01(B)(3)(a), 4141.01(B)(3)(g)

(B) (1) "Employment" means:

(a) Service performed for wages under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation;

(b) Services performed by an individual for remuneration unless it is shown to the satisfaction of the administrator that such individual:

(i) Has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;

(ii) That such service is outside the usual course of the business for which service is performed; and

(iii) That such individual is customarily engaged in an independently established trade, occupation, profession, or business.

(2) "Employment" includes:

(a) Service performed after December 31, 1971, by an individual in the employ of the state or any of its instrumentalities, or in the employ of the state and

one or more other states or their instrumentalities, in the classified service as defined in division (B) of section *143.08 of the Revised Code or the services of employees covered by voluntary election, as provided under divisions (A) (4) and (5) of this section;

(i) Service performed after December 31, 1973, by an individual in the employ of any political subdivision of this state or any instrumentality of that political subdivision except for service performed as a substitute teacher employed by a public school district pursuant to section 3319.10 of the Revised Code.

(b) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational, or other organization which is excluded from the term "employment" as defined in the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301, solely by reason of section 26 U.S.C.A. 3306 (c) (8) of that act and is not excluded under division (B) (3) of this section;

(c) Service not covered under division (B) (1) (b) of this section which is performed after December 31, 1971:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, laundry, or drycleaning services, for his employer or his principal;

(ii) As a traveling or city salesman, other than as on agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and in the transmission to his employer or his principal except for sideline sales activities on behalf of some other person of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other simi-

* Section 143.08 changed to 124.11, Amend. S. B. No. 174. Eff 12/4/73.

lar establishments for merchandise for resale, or supplies for use in their business operations; provided that for the purposes of this subdivision, the services shall be deemed employment if the contractor of service contemplates that substantially all of the services are to be performed personally by the individual himself and that the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation, and the services are not in the nature of a single transaction that is not a part of a continuing relationship with the person for whom the services are performed.

(d) An individual's entire service performed within or both within and without the state if:

(i) The service is localized in this state.

(ii) The service is not localized in any state, but some of the service is performed in this state and either the base of operations, or if there is no base of operations then the place from which such service is directed or controlled, is in this state or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state.

(e) Service not covered under division (B) (2) (d) (ii) of this section and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state, the Virgin Islands, Canada, or of the United States, if the individual performing such service is a resident of this state and the administrator of the bureau of employment services

approves the election of the employer for whom such services are performed; or, if he is not a resident of this state but the place from which the service is directed or controlled is in this state, the entire services of such individual shall be deemed to be employment subject to sections 4141.01 to 4141.46 of the Revised Code; provided service is deemed to be localized within this state if the service is performed entirely within this state or if the service is performed both within and without this state but the service performed without this state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions;

(f) Service of an individual who is a citizen of the United States, performed outside the United States except in Canada or the Virgin Islands, after December 31, 1971, in the employ of an American employer, other than service which is "employment" under subdivisions (d) and (e) of this division or similar provisions of another state's law, if:

(i) The employer's principal place of business in the United States is located in this state:

(ii) The employer has no place of business in the United States, but the employer is an individual who is a resident of this state; or the employer is a corporation which is organized under the laws of this state, or the employer is a partnership or a trust and the number of partners or trustees who are resident of this state is greater than the number who are residents of any other state; or

(iii) None of the criteria of subdivisions (B) (2) (f) (i) and (ii) of this section is met but the employer has elected coverage in this state or the employer hav-

ing failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under Chapter 4141. of the Revised Code.

(g) For the purposes of subdivision (B) (2) (f) of this section, the term "American employer" means an employer who is an individual who is a resident of the United States; or a partnership, if two-thirds or more of the partners are residents of the United States; or a trust, if all of the trustees are residents of the United States; or a corporation organized under the laws of the United States or of any state provided, the term "United States" includes the states, the District of Columbia, and the Commonwealth of Puerto Rico.

(h) Notwithstanding any other provisions of subdivisions (1) and (2) of division (B) of this section, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund, or service, which, as a condition for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301, is required to be covered under Chapter 4141. of the Revised Code.

(3) "Employment" does not include the following services if they are found not subject to the "Federal Unemployment Tax Act," 84 Stat. 713 (1970), 26 U.S.C.A. 3301, and if the services are not required to be included under division (B) (2) (h) of this section:

(a) Agricultural labor;

(b) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;

(c) Service performed prior to January 1, 1972, in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of purely governmental functions. Service performed after December 31, 1971, in the employ of any instrumentality of the United States and the following services when performed for this state or a political subdivision as described in division (B) (2) (a) of this section except when performed for a public school district as described in section 3311.01 of the Revised Code, or a hospital or an institution of higher education as defined in divisions (X) and (Z), respectively, of this section as an elected official or any other employee not in the classified service as defined in division (B) of section 143.08* of the Revised Code.

(d) Service performed prior to January 1, 1972, in the employ of a private or parochial school, college, or university as a teacher, in research or experimental work, as an administrative officer, or as a member of the faculty. Service performed after December 31, 1971, in the employ of a nonprofit or parochial school, not an institution of higher education as defined in division (Z) of this sectio;

(e) Service performed prior to January 1, 1972, as a short-time worker by a minor whose principal occupation is a student attending public or private school. Service performed after December 31, 1971:

(i) In the employ of a school, college, or university including those operated by the state or a political subdivision, if such service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university; or

(ii) By an individual under the age of twenty-two years who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, provided that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(f) Service performed by an individual in the employ of his son, daughter, or spouse and service performed by a child under the age of eighteen in the employ of his father or mother;

(g) Service performed for one or more principals by an individual who is compensated on a commission basis, who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971:

(i) By an individual for an employer as an insurance agent or as an insurance solicitor, if all this service is performed for remuneration solely by way of commission;

(ii) As a home worker performing work, according to specifications furnished by the employer for whom the services are performed, on materials or goods furnished by such employer which are required to be returned to the employer or to a person designated for that purpose.

(h) Service performed prior to January 1, 1972, in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefits of any private shareholder or individual, and the activities of which are confined exclusively to the rendition of service, or the production of commodities, for its respective religious, charitable, scientific, literary, or educational purposes. Service performed after December 31, 1971:

(i) In the employ of a church or convention or association of churches, or in an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work;

(i) Service performed after June 30, 1939, with

respect to which unemployment compensation is payable under the "Railroad Unemployment Insurance Act," 52 Stat. 1094 (1938), 45 U.S.C. 351;

(j) Service performed by an individual in the employ of any organization exempt from income tax under section 501 of the "Internal Revenue Code of 1954," if the remuneration for such service does not exceed fifty dollars in any calendar quarter, of if such service is in connection with the collection of dues or premiums for a fraternal beneficial society, order, or association and is performed away from the home office or is ritualistic service in connection with any such society, order, or association;

(k) Casual labor not in the course of an employer's trade or business; incidental service performed by an officer, appraiser, or member of a finance committee of a bank, building and loan association, or savings association when the remuneration for such incidental service exclusive of the amount paid or allotted for directors' fees does not exceed sixty dollars per calendar quarter is casual labor;

(l) Service performed in the employ of a voluntary employees' beneficial association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if admission to a membership in such association is limited to individuals who are officers or employees of a municipal or public corporation, of a political subdivision of the state, or of the United States and no part of the net earnings of such association inures, other than through such payments, to the benefit of any private shareholder or individual;

(m) Service performed by an individual in the employ of a foreign government, including service as a

consular or other officer or employee or of a nondiplomatic representative;

(n) Service performed in the employ of an instrumentality wholly owned by a foreign government if the service is of a character similar to that performed in foreign countries by employees of the United States or of an instrumentality thereof and if the administrator finds that the secretary of state of the United States has certified to the secretary of the treasury of the United States that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States and of instrumentalities thereof;

(o) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(p) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law, and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;

(q) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(r) Service performed in the employ of the United States or an instrumentality of the United States immune under the constitution of the United States from the contributions imposed by sections 4141.01 to

4141.46 of the Revised Code, except that to the extent that congress permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, sections 4141.01 to 4141.46 of the Revised Code, shall be applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, individuals, and services: provided that if this state is not certified for any year by the proper agency of the United States under section 3304 of the "Internal Revenue Code of 1954," the payments required of such instrumentalities with respect to such year shall be refunded by the administrator from the fund in the same manner and within the same period as is provided in division (E) of section 4141.09 of the Revised Code with respect to contributions erroneously collected;

(s) Service performed by an individual as a member of a band or orchestra; provided such service does not represent the principal occupation of such individual, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971, for a nonprofit organization, a hospital or institution of higher education of this state, or a political subdivision, as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work-relief or work-training;

(t) Service performed in the employ of a day camp whose camping season does not exceed twelve weeks in

any calendar year, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971:

(i) In the employ of a hospital, if the service is performed by a patient of the hospital, as defined in division (X) of this section; or

(ii) For a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution.

(u) Notwithstanding any other provisions of division (B) (3) of this section, services which are excluded under subdivisions (g), (j), (k), and (l) of this division, shall not be excluded from employment when performed for a nonprofit organization, as defined in division (Y) of this section or for a hospital or institution of higher education of this state or for a political subdivision.

SECTION 4141.28(H), (I), (J), OHIO REVISED CODE

(H) Any interested party may appeal the administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith.

(I) Requests for reconsideration or appeals may be filed with the board, with the administrator or one of his deputies, with an employee of another state or federal agency, or with an employee of the unemployment

insurance commission of Canada charged with the duty of accepting claims. Any timely written notice stating that the interested party desires a review of the previous determination or decision therefor, shall be accepted.

(J) When an appeal from a decision on reconsideration of the administrator or deputy is taken, all interested parties shall be notified and the board or a referee shall, after affording such parties reasonable opportunity for a fair hearing, affirm, modify, or reverse the findings of fact and the decision of the administrator or deputy in the manner which appears just and proper. In the conduct of such hearing or any other hearing on appeal to the board which is provided in this section, the board and the referees shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. The board and the referees shall take any steps in such hearing.

(1) The failure of the claimant or other interested party to appear at a hearing, unless he is the appealing party, shall not preclude a decision in his favor, if on the basis of all the information in the record, including that contained in the file of the administrator, he is entitled to such decision.

SECTION 4141.29, OHIO REVISED CODE

4141.29 Eligibility and qualification for benefits.

Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46 of the Revised Code.

(A) No individual is entitled to a waiting period or benefits for any week unless he:

(1) Has filed a valid application for determination of benefit rights in accordance with section 4141.28 of the Revised Code;

(2) Has made a claim for benefits in accordance with section 4141.28 of the Revised Code;

(3) Has registered at an employment office or other registration place maintained or designated by the administrator of the bureau of employment services. Registration shall be made in person or in writing in accordance with the time limits, frequency, and manner prescribed by the administrator.

(4) (a) Is able to work and available for suitable work and is actively seeking suitable work either in a locality in which he has earned wages subject to Chapter 4141. of the Revised Code, during his base period, or if he leaves such locality, then in a locality where suitable work is normally performed.

The administrator may waive the requirement that a claimant be actively seeking work when he finds that an individual has been laid off and the employer who laid him off has notified the administrator within ten days after the layoff, that work is expected to be available for the individual within a specified number of days not to exceed forty-five calendar days following the last day the individual worked. In the event the individual is not recalled within the specified period, such waiver shall cease to be operative with respect to such layoff.

(b) The individual shall be instructed as to the efforts that he must make in his search for suitable work, except where the active search for work requirement has been waived under division (A) (4) (a) of this section, and shall keep a record of where and when he has sought work in complying with such instruc-

tions and shall, upon request, produce such record for examination by the administrator.

(c) An individual who is attending a vocational training course, approved by the Ohio worker training committee or the administrator, meets the requirement of this division, if such attendance was recommended by the administrator and the individual is regularly attending the course, and is making satisfactory progress.

(d) An individual who becomes unemployed while attending a regularly established school and whose base period credit weeks were earned in whole or in part while attending such school, meets the availability and active search for work requirements of division (A) (4) (a) of this section if he makes himself available on any shift of hours for suitable employment with his most recent employer or any other employer in his base period, or for any other suitable employment to which he is directed, under Chapter 4141. of the Revised Code.

(e) The administrator shall adopt such rules and regulations as he deems necessary for the administration of division (A) (4) of this section.

(5) Is unable to obtain suitable work.

(B) An individual suffering total or partial unemployment is eligible for benefits for unemployment occurring subsequent to a waiting period of one week and no benefits shall be or become payable during this required waiting period, but no more than one week of waiting period shall be required of any such individual in any benefit year in order to establish his eligibility for total or partial unemployment benefits.

(C) The waiting period for total or partial unemployment shall commence on the first day of the first week with respect to which the individual first files a

claim for benefits at an employment office or other place of registration maintained or designated by the administrator or on the first day of the first week with respect to which he has otherwise filed a claim for benefits in accordance with the rules and regulations of the bureau of employment services, provided such claim is allowed by the administrator or his deputy.

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

(1) For any week with respect to which the administrator finds that:

(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged in the dispute, or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

(b) He has been given a disciplinary layoff for misconduct in connection with his work.

(2) For the duration of his unemployment if the administrator finds that:

(a) He quit his work without just cause or has been discharged for just cause in connection with his work, provided division (D) (2) of this section does not apply to the separation of a person under any of the following circumstances:

(i) Separation from employment for the purpose of entering the armed forces of the United States if he makes application to enter, or is inducted into such armed forces within thirty days after such separation;

(ii) Separation from employment pursuant to a labor-management contract or agreement, or pursuant to an established employer plan, program, or policy, which permits the employee, because of lack of work, to accept a separation from employment;

(iii) He has left his employment to accept a recall from a prior employer or to accept other employment as provided under section 4141.291 [4141.29.1] of the Revised Code, or has left employment which is or was concurrent employment where the remuneration, hours, or other conditions of such employment are substantially less favorable than his other work which was performed during such concurrent employment and where such employment, if offered as new work, would be considered not suitable under the provisions of divisions (E) and (F) of this section. Any benefits which would otherwise be chargeable to the account of the employer from whom an individual has left employment under conditions described in division (D) (2) (a) (iii) of this section, shall instead be charged to the mutualized account as provided in division (C) of section 4141.291 [4141.29.1] of the Revised Code.

(b) He has refused without good cause to accept an offer of suitable work when made by an employer either in person or to his last known address, or has refused or failed to investigate a referral to suitable work when directed to do so by a local employment office of this state or another state; provided, that this division shall not cause a disqualification for a waiting week or benefits under the following circumstances:

(i) When work is offered by his employer and he is not required to accept the offer pursuant to the terms of the labor-management contract or agreement, or pursuant to an established employer plan, program, or policy; or

(ii) When the individual is attending a vocational training course pursuant to division (A) (4) of this section except, in the event of a refusal to accept an offer of suitable work or a refusal or failure to investigate a referral, benefits thereafter paid to such individual shall not be charged to the account of any employer and, except as provided in division (B) (1) (b) of section 4141.241 [4142.24.1] of the Revised Code, shall be charged to the mutualized account as provided in division (C) of section 4141.25 of the Revised Code.

(c) Such individual quit work to marry or because of marital, parental, filial, or other domestic obligations or became unemployed because of pregnancy.

(d) He has knowingly made a false statement or representation or knowingly failed to report any material fact with the object of obtaining benefits to which he is not entitled.

(e) He became unemployed by reason of commitment to any penal institution.

(f) He became unemployed because of dishonesty in connection with his most recent or any base period

work. Remuneration earned in such work shall be excluded from such individual's total base period remuneration for the purpose of determining the total benefits to which such individual is entitled under division (D) of section 4141.30 of the Revised Code, and shall be excluded from the maximum amount to be charged, under division (D) of section 4141.24 of the Revised Code, against the account of the employer who discharged such individual. In addition, no benefits shall thereafter be paid to such individual based upon such remuneration.

(E) No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work if:

(1) As a condition of being so employed he would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization.

(2) The position offered is vacant due directly to a strike, lockout, or other labor dispute.

(3) The work is at an unreasonable distance from his residence, having regard to the character of the work he has been accustomd to do, and travel to the place of work involves expenses substantially greater than that required for his former work, unless the expense is provided for.

(4) The remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

(F) In determining whether any work is suitable for a claimant in the administration of sections

4141.01 to 4141.46 of the Revised Code, the administrator shall, in addition to the determination required under division (E) of this section, consider the degree of risk to the claimant's health, safety, and morals, his physical fitness for the work, his prior training and experience, the length of his unemployment, the distance of the available work from his residence, and his prospects for obtaining local work.

(G) "Duration of his unemployment," as used in this section, means the full period of unemployment next ensuing after a separation from any base period or subsequent work and until an individual has become re-employed in employment subject to sections 4141.01 to 4141.46 of the Revised Code, or the unemployment compensation act of another state, or of the United States, and until such individual has worked six weeks and has earned wages equal to three times his average weekly wage or three hundred sixty dollars, whichever is less, except for purposes of division (D) (2) (c) of this section, such term means the full period of unemployment next ensuing after a separation from such work and until such individual has become re-employed subject to the terms set forth above, and has earned wages equal to one half of his average weekly wage or sixty dollars, whichever is less, provided that in the case of a woman who became unemployed because of pregnancy such duration of unemployment shall continue until such time, after the date of her delivery, as she furnishes medical evidence that she is fully able to work, and that work with her former employer is no longer available, provided if she has made a bona fide change in residence which makes a return to work with her former employer unreasonable, because of distance, then her duration of unemployment may be

ended the same as described in this division for disqualifications under division (D) (2) (c) of this section.

(H) Except as provided in division (B) (1) (b) of section 4141.241 [4141.24.1] of the Revised Code, if a claimant is disqualified under division (D) (2) (a), (c), or (e) of this section, then benefits which may become payable to such claimant, which are chargeable to the account of the employer from whom he was separated under disqualifying conditions, shall be charged to the mutualized account provided in section 4141.25 of the Revised Code, such charges to be made in accordance with the charge sequence provided in section 4141.24 of the Revised Code; except, if the disqualification is for reason of pregnancy, under division (D) (2) (c) of this section, benefits shall be charged to the mutualized account only when the claimant has voluntarily discontinued her employment because of pregnancy.

(I) Benefits based on service in employment as provided in divisions (B) (2) (a) and (B) (2) (b) of section 4141.01 of the Revised Code, shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to Chapter 4141. of the Revised Code; except that benefits based on service in an instructional, research, or principal administrative capacity in an institution of higher education, as defined in division (Z) of section 4141.01 of the Revised Code, shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave

provided for in the individual's contract, if the individual has a contract or contracts to perform services in any such capacity for any institution or institutions of higher education for both such academic years or both such terms. Benefits based on service in an instructional, research, or principal administrative capacity for a public school district shall not be paid to any individual for any week of unemployment which begins during the period between two successive academic years or terms of the employing school district provided the individual was in employment with the school district at the termination of the first such academic year or term.

SECTION 4141.301, OHIO REVISED CODE

4141.301 Extended benefits.

(A) As used in this section, unless the context clearly requires otherwise:

(1) "Extended benefit period" means a period which:

(a) Begins with the third week after whichever of the following weeks occurs first:

(i) A week for which there is a national "on" indicator; or

(ii) A week for which there is a state "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(i) The third week after the first week for which there is both a national "off" indicator and a state "off" indicator; or

(ii) The thirteenth consecutive week of such period;

Except, that no extended benefit period may begin by reason of a state "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state, and that within the period beginning on the effective date of this section and ending on December 31, 1971, an extended benefit period may become effective and be terminated in this state solely by reason of a state "on" indicator and a state "off" indicator, respectively.

(2) A "national 'on' indicator" exists for a week if the United States secretary of labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment, seasonally adjusted, for all states equaled or exceeded four and five-tenths per cent.

* * *

(4) There is a "state 'on' indicator" for this state for a week if the administrator determines, in accordance with the regulations of the United States secretary of labor, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment, not seasonally adjusted, under Chapter 4141. of the Revised Code:

* * *

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address — Leonard P. Hodory, 1810 Paisley St., APT #24, Youngstown, Oh. 44515

2. Employer's Name and Address — United States Steel Corp., Youngstown District, Attn: A. Johnston, 1509 Muriel St., Pittsburgh, Pa. 15203

3 Date Mailed 1-3-75

4 Social Security Account Number 289 42 5007

5 Benefit Year Began 11-10-74

6 Local Office Number 809-1

7 THIS NOTICE IS A DETERMINATION OF:
- [X] (a) First Weekly Claim
- [ ] (b) Additional (Reopened) Weekly Claim
- [ ] (c) Continued Weekly Claim
- [ ] (d) Other — See Decision Below

8 ISSUE(S): LABOR DISPUTE 11-5-74

APPLICABLE LAW: ... Section 4141.29(D)(1)(a) Ohio Law

A labor dispute started at coal mines owned and operated by U.S. Steel Corporation and claimant is unemployed because of this labor dispute. The law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute.

Accordingly claim for week ending 11-16-74 is hereby disallowed.

Week ending 11-16-74 is further disallowed as claimant had earnings in excess of his weekly benefit amount.

Exhibit "2"

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address — Leonard P. Modory, 1010 Paisley St. Apt. 24, Youngstown, Ohio 44505

2. Employer's Name and Address —

3. Date Mailed 1 2 3 75

4. Social Security Account Number 289-42-5007

5. Benefit Year Began 11-10-74

6. Local Office Number 809-1

7. THIS NOTICE IS A DETERMINATION OF:
- ☐ (a) First Weekly Claim
- ☐ (b) Additional (Reopened) Weekly Claim
- ☒ (c) Continued Weekly Claim
- ☐ (d) Other — See Decision Below

8. ISSUE(S): Labor Dispute 11-15-74 - 1-11-75

APPLICABLE LAW: ... 4141.29(D)(1)(a) Ohio Law

During the period between 11-15-74 and 1-11-75 a labor dispute existed at coal mines owned and operated by United States Steel. This dispute caused a curtailment of operations at the United States Steel plant in Youngstown, Ohio, where claimant was employed. As a result of such curtailment, claimant was separated from his employment with United States Steel.

Section 4141.29 (D)(1)(a) Ohio law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute that exists anywhere at an establishment owned and operated by his employer. Accordingly, claims for unemployment benefits for the following weeks are hereby disallowed.

Week Ending 11-23-74	Week Ending 12-21-74
Week Ending 11-30-74	Week Ending 12-28-74
Week Ending 12-07-74	Week Ending 01-04-75
Week Ending 12-14-74	Week Ending 01-11-75

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address — O. C. Webster, 111 Columbia St., Youngstown, Ohio 44510

2. Employer's Name and Address — Republic Steel Corp. Plt. 20

3. Date Mailed 1 / 1 75

4. Social Security Account Number 426-30-1364

5. Benefit Year Began 12-29-74

6. Local Office Number 869-0

7. THIS NOTICE IS A DETERMINATION OF:
- ☐ (a) First Weekly Claim
- ☐ (b) Additional (Reopened) Weekly Claim
- ☒ (c) Continued Weekly Claim
- ☐ (d) Other — See Decision Below

8. ISSUE(S): LABOR DISPUTE
11-17-74 through 1-11-75

APPLICABLE LAW: ... Sec. 4141.29(D)(1)(a) Ohio Law

From 11-17-74 through 1-11-75 claimant was unemployeddue to a labor dispute at coal mines owned and operated by Republic Steel Corp. The law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute. Accordingly, claim for week ending 1-11-75 is hereby disallowed.

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

Filed Mar. 5 9:13 AM '76
No. C 75-15 Y

MEMORANDUM OPINION AND ORDER

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

Plaintiff, Leonard Paul Hodory (Hodory) filed the above-mentioned action, pursuant to 42 U.S.C. §1983, on behalf of himself and all other persons similarly situated whose claims for unemployment benefits were denied or will be denied because of the operative effective of a labor dispute disqualification provision in §4141.29 (D) (1) (a) of the Ohio Revised Code.

Hodory challenged the constitutionality of §4141.29 (D) (1) (a) on grounds that: the provision is in conflict with §303(a)(1) of the Federal Society Security Act, 42 U.S.C. §503(a)(1) and violates the Supremacy Clause to the United States Constitution; the labor dispute disqualification contained therein denies plaintiff and the class he seeks to represent the right to equal protection of the laws, guaranteed under the

14th Amendment to the United States Constitution; and the overbroad disqualification provision bears no real and substantial relation to the legislative purpose and constitutes a denial of due process of law guaranteed by the 14th Amendment to the United States Constitution.

Hodory requested the issuance of permanent injunctive relief to restrain the Ohio Bureau of Employment Services (Employment Bureau) and the Administrator, Albert E. Giles, from enforcing §4141.29 (D)(1)(a) and a declaration that the statute is unconstitutional. In addition, plaintiff sought past unemployment benefits for himself and the class he purports to represent which he alleged were denied by virtue of the application of that statutory provision.

This matter came on for hearing before this three-judge Court on October 23, 1975. The following are the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The operative facts as set forth herein were not disputed by the parties.

Hodory was laid off from his job as a Millwright apprentice with the United States Steel Corporation (U.S. Steel), Ohio Works, in Youngstown, Ohio on November 12, 1974. He applied for unemployment benefits on November 13, 1974 and was subsequently notified by the Ohio Bureau of Employment Services (Employment Bureau) that his claim was disallowed, pursuant to §4141.29(D)(1)(a) O.R.C.

Section 4141.29 (D) (1) (a) provides, in pertinent part:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or

be paid benefits under the following conditions: (1) for any week with respect to which the administrator finds that:

(a) **His unemployment was due to a labor dispute** other than a lockout **at any factory, establishment, or other premises** located in this or any other state and **owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute** . . . Emphasis added.)

It is clear that Hodory became unemployed through no fault of his own. He was one of approximately 1250 United Steelworkers who was laid off by either U.S. Steel or Republic Steel Corporation at their plants in Ohio because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two steel companies. The steelworkers were in no way involved in the disqualifying labor dispute between the coal miners and the steel companies nor did they benefit from that dispute.

Hodory was denied unemployment benefits from November of 1974 through January 11, 1975, at which time the coal miners' strike was apparently terminated. The Employment Bureau's sole basis for denying Hodory's application for weekly benefits during this period was that such benefits were barred under the labor dispute disqualification found in §4141.29 (D)(1)(a) O.R.C.

Hodory has taken an administrative appeal from the decision of the Employment Bureau, which appeal is still pending. It is being considered along with the appeals of the approximately 1250 other claimants similarly situated as a "group appeal" by the administrative Board of Review.

Hodory resumed his employment on March 30, 1975 and is presently employed.

During the pendency of this lawsuit §4141.29(D)(1)(a) O.R.C. was amended to provide, in pertinent part, that:

> . . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . .

This amendment, Am. Sub. Senate Bill 173, however did not become effective until December 2, 1975, and is not to be retroactively applied.

II. CONCLUSIONS OF LAW

A. Availability of Relief in this Court

The first issue for this Court to consider is whether, in light of the pendency of the appellate administrative proceedings, this Court is precluded from adjudicating plaintiff's claims and from issuing injunctive relief against the defendants should the Court conclude that plaintiff is entitled to such relief on the merits of his claims.

Initially, it should be noted that there is no absolute bar in this case against the issuance of injunctive relief under the provisions of 28 U.S.C. §2283, the Anti-injunction statute. *Mitchum v. Foster*, 407 U.S. 225 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

The Court must, nevertheless, consider the possible applicability of certain established principles of equity, comity, and federalism which would require this Court to refrain from determining the claims for injunctive relief.

The Supreme Court has recently articulated those circumstances in which such principles may suggest that a federal court refrain from exercising jurisdiction or abstain from determining claims for injunctive relief: 1) where a party has failed to exhaust available administrative remedies; 2) where a party seeks to enjoin a pending state criminal prosecution in the absence of special circumstances as set forth in *Younger v. Harris*, 401 U.S. 37 (1971); or where abstention and a stay in federal court is indicated to afford the state courts an opportunity to determine unsettled questions of state law prior to federal court intervention on the federal constitutional questions. *Gibson v. Berryhill, supra*, 411 U.S. at 573-574.

Upon due consideration, the Court concludes that the circumstances of the present case do not present a situation where dismissal or abstention would be appropriate. While clearly the plaintiff herein has not exhausted the administrative remedies which are available under Ohio law, in *Gibson*, the Supreme Court stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U.S.C. §1983. Moreover, in the instant action, exhaustion of the available administrative remedies would in all probability prove a futile effort to vindicate plaintiff's constitutional claims in this case. Section 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits for the period he was

laid off due to coal miners' strike. In addition, the Employment Bureau has denied benefits to plaintiff, as well as the 1250 United Steelworkers, who were similarly effected by the coal miners' strike, solely on the basis of the challenged labor dispute disqualification.

It was established at the hearing that the administrative appeal process does not permit the plaintiff to challenge the constitutionality of §4141.29(D)(1)(a). The agency is bound by the prior Ohio court determinations as to the effect of that provision, and the Ohio courts have held the disqualification provision to be constitutional.[1] The plaintiff's failure to exhaust his administrative remedies therefore does not require a dismissal of his claims.

With regard to the Supreme Court's pronouncement in *Younger v. Harris, supra*, and the Court's subsequent decision in *Huffman v. Pursue*, 420 U.S. 592 (1975), the Court finds that the principles set forth in those cases do not necessitate that this Court exercise restraint in determining the issues raised herein or from issuing injunctive relief, should plaintiff be entitled to the same. While the *Huffman* decision broadens the judicially-created *Younger* doctrine to

---

[1] In an unpublished decision, the Court of Appeals of Montgomery County, Ohio, upheld the constitutionality of the provision. *Barnes v. Board of Review*, Case No. 3948, (1972). Moreover, the defendants cited to several Ohio Supreme Court cases in their brief and during oral argument in support of their position that §4141.29(D)(1)(a) does not create an unconstitutional classification in violation of the Equal Protection clause of the 14th Amendment. *Cornell v. Bailey*, 163 Ohio St. 50 (1955); *Continental Can Company, Inc. v. Donahue*, 5 Ohio St. 2nd 224 (1966). In *Cornell v. Bailey*, the Supreme Court noted that it was the positive intent of the Ohio General Assembly to exclude those individuals who were involuntarily unemployed as well as those voluntarily unemployed as a result of a labor dispute from benefits. The Supreme Court concluded that such determination was a legislative function and that the only relief available to an involuntarily unemployed claimant was to seek a legislative amendment to the statute.

include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state courts, the Supreme Court in *Huffman* made it clear that its holding was limited to the enjoining of ongoing state-initiated *judicial* proceedings and that such prohibition did not extend to an action brought under 42 U.S.C. §1983 in which a party was challenging state administrative action in federal court. *Supra*, n.21.

Finally, this Court concludes that abstention would not be proper in this case. Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law which could be rendered constitutionally inoffensive by a limiting construction in the state courts. *Daniels v. Waters*, F.2d (6th Cir. 1975). It has been held that "[A]bstention should not be applied merely to await an attempt to vindicate a claim of the appellant in state court." *Gay v. Board of Registration Commissioners*, 466 F.2d 879, 885 (6th Cir. 1972). In the instant case, plaintiff has not yet even reached the first level of judicial review and under §4141.28 of the Ohio Revised Code, he is required to undertake three administrative appeals before he will be entitled to file his challenge in the state courts, where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled.

Accordingly, for the reasons set forth above, the Court concludes that the principles of comity, equity, and federalism do not require that this Court dismiss the instant suit or abstain from deciding the claims presented herein until such time as the state courts may have an opportunity to adjudicate the same or from issuing whatever relief may be appropriate upon its determination.

B. Class Certification

Plaintiff, in his complaint, defined the class he purports to represent herein as all persons whose claims for unemployment benefits have been or will be denied because of the operative effect of §4141.29(D)(1)(a). While the Court does find that class certification of the claims for injunctive and declaratory relief and past benefits is appropriate, the class as defined by plaintiff in his complaint is over broad in light of the nature of plaintiff's claims and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The plaintiff's factual allegations and the undisputed evidence presented herein established that Hodory and approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in §4141.29(D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits.[2] With regard to this particular group of individuals, the Court finds that the prerequisites to certification of this action as a class action under Rule 23(a) have been met, and that the class action is maintainable under the provisions of Rule 23(b)(2)[3]. In light of the fact that the class is certi-

[2] At the hearing, plaintiff stated that the claims of some 6100 Autoworkers in Youngstown, Ohio have been denied by defendants on the sole basis of the challenged disqualification provision. However, no further factual support was offered in this regard from which this Court can conclude that plaintiff's representation of these individuals in this suit would be proper under Rule 23.

[3] The fact that plaintiff seeks the award of past unemployment benefits does not effect the certification of this class as a Rule 23(b)(2) class. The monetary relief is essential in the nature of equitable relief rather than damages, and there is authority to support the maintainability of the class under 23(b)(2) in such circumstances. *Bermudez v. U.S. Department of Agriculture*, 490 F.2d 718 (D.C. Cir. 1973); *see also, Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); 3B Moore's Federal Practice ¶23.40.

fied as a Rule 23(b)(2) class and the nature of the relief sought, the Court concludes that notice prior to the determination of the claims herein is not required.

C. Constitutional Validity of §4141.29(D)(1)(a)

Plaintiff has challenged the constitutionality of §4141.29(D)(1)(a) on several grounds. For the reasons set forth below, this Court concludes that the operative effect of that labor dispute disqualification provision violates the rights of plaintiff and the class he represents to equal protection and due process of law as guaranteed under the 14th Amendment to the United States Constitution and 42 U.S.C. §1983.

Chapter 4141 of the Ohio Revised Code, which was enacted by the Ohio Legislative pursuant to the Federal Social Security Act, provides generally for the payment of benefits to unemployed individuals. In §4141.29 it is indicated that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to **involuntary** total or partial unemployment. That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving such benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through some fault of their own.[4] Thus the provisions of §4141.29(d)(1) reflect that an individual may not receive benefits if that person has been laid off for disciplinary reasons; or if the person quit work without just cause; or if the individual quit work to become married or because of marital, parental, filial or other domestic obligations, or become unemployed because of pregnancy; or if the person has made false statements in an attempt to obtain benefits; or if the person was discharged for dishonesty in connection with his most recent employment; or if the person has become unemployed as the result of a labor dispute. Therefore, the only class of unemployed individuals who are presently ineligible for benefits as a result of their having become unemployed involuntarily are those persons who fall within the labor dispute disqualification found in §4141.29(D)(1)(a).[5]

[4] The statute was previously held constitutional in the case of *Lasko v. Garnes*, No. C 72-1350 (N.D. Ohio, decided August 14, 1973), wherein the disallowance of benefits because of pregnancy was the basis of the challenge.

A state legislature may create a classification which discriminates against certain individuals without violating the Equal Protection clause in the 14th Amendment, if that classification furthers a suitable governmental interest. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

In the instant action, the defendants argued in their brief that the legitimate reasons for the enactment of §4141.29(D)(1)(a) were that:

> 1. Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect be subsidizing the union members;
> 2. Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. If the financial burden of supporting its striking union members is shifted from the unions' treasury to the State of Ohio, it's con-

[5] Of course, as of December 2, 1975 defendants will not be permitted to deny benefits to one unemployed due to a labor dispute unless an element of fault—"financing, participating in, or directly interested in"—demonstrated. However, the amendment does not moot the issues raised herein, since, as noted previously, it is not to be applied retroactively and will not effect the status of plaintiff and the class for the period during which they were denied benefits pursuant to §4141.29(D)(1)(a).

ceivable that no concerted effort to negotiate a fair settlement would be pursued until the employer reached a financial crisis, thereby yielding to unreasonable and economically unsound union demands to prevent bankruptcy;

3. The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U.S. Steel, Republic Steel . . . and other corporate giants involve many hundreds of employees, even thousands. Benefits paid to workers resulting from labor strikes lasting for many weeks or months would deplete the unemployment fund.

The Court concludes that defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. Each reason advanced contemplates that a union member, who is unemployed by virtue of a labor dispute between his employer and another union, has some control over, is at fault, or stands to benefit from that labor dispute. In fact, the evidence presented herein established that plaintiff and the class he represents were merely victims of the coal miners' strike, as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect his employer's financial ability to continue to employ him. The fact that the plaintiff and the 1250 class members also happen to be union members (of a different union) is certainly no legitimate reason, standing alone, to deny them benefits. Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intending to prevent is not the "subsidizing" of unemployed **union members** per se, but the subsidizing of union-initiated work stoppages.

Certainly the three purposes offered by defendants would be legitimate reasons for the State's denial of benefits to unemployed members of a union which is involved in a labor dispute. However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid the subsidization of the coal miners' strike. Nor is it logical to conclude that payments of unemployment benefits to the **Steelworkers** would have placed U.S. Steel or Republic Steel at an unfair disadvantage in negotiations with the **coal miners' union.** Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy.

The Court finds, therefore, that the defendants have failed to demonstrate that the classification imposed by §4141.29(D)(1)(a) is justified by a legitimate state interest under the circumstances of this case, and, accordingly, the Court concludes that the application of the labor dispute disqualification to deny benefits to plaintiff and the class certified herein is violative of the Equal Protection clause of the 14th Amendment and plaintiffs' rights as guaranteed by 42 U.S.C. §1983.

Similarly, the Court finds that the defendants have failed to demonstrate that the application of §4141.29 (D)(1)(a) with respect to plaintiff and the class bears a real and substantial relation to a legitimate state purpose and, therefore, the statutory provision as applied in this case to deny individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer, also vio-

lates plaintiffs' right to due process of law guaranteed by the 14th Amendment and 42 U.S.C. §1983.

Since the Court has declared the application of §4141.29(D)(1)(a) to be constitutionally invalid as to plaintiff and the class members on equal protection and due process grounds, the Court need not reach the other issues raised by plaintiff in his complaint.

D. Relief

The Court finds that plaintiff and the members of the class of steelworkers, who were laid off for a specific period of time because of the labor dispute between their employer and the United Mine Workers and who, but for the labor dispute disqualification provision, §4141.29(D)(1)(a), would have been entitled to collect unemployment benefits, are entitled to equitable relief in this case. Accordingly, the defendants, their agents and employees are enjoined from continuing to enforce §4141.29(D)(1)(a) of the Ohio Revised Code so as to deny the unemployment benefits to plaintiff and the class members which they are entitled to receive. In this regard, the defendants shall pay those past unemployment benefits which would have been provided to each otherwise qualified claimant within this class to whom such benefits were denied on the sole basis of §4141.29(D)(1)(a).

This case is hereby terminated.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: March 4, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

Filed Mar. 9:13 AM '76
No. C 75-15 Y

JUDGMENT

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

In accordance with the accompanying Memorandum Opinion and Order, the defendants are enjoined from continuing to enforce Ohio Revised Code §4141.29(D)(1)(a) so as to deny the plaintiff and the class members the unemployment benefits to which they are otherwise entitled, and defendants are further ordered to pay past unemployment benefits which were denied plaintiff and members of the class solely on the basis of §4141.29(D)(1)(a). Plaintiffs shall recover their costs of suit.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: March 4, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff-Appellee

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

Filed Apr. 6 2:45 PM '76
No. C 15-15 Y

ORDER

Pursuant to Rule 62(c), Federal Rules of Civil Procedure and upon request of the defendants, the Court hereby suspends the injunctive relief granted in the Judgment entered in the above-styled case on March 5, 1976. The stay shall continue in effect until the conclusion of the appeal taken by defendants. The defendants need not post bond.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: April 6, 1976

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants

Filed Mar. 26 3:29 PM '76

CIVIL ACTION NO. C 75-15 Y
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Ohio Bureau of Employment Services, Albert G. Giles, Administrator, defendants above named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the United States District Court, Northern District of Ohio, Eastern Division entered in this action on March 4, 1976 and filed on March 5, 1976.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

WILLIAM J. BROWN,
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RICHARD A. SZILAGY,
Assistant Attorney General
Ohio Bureau of Employment Services
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 1976, copies of this Notice of Appeal were mailed, postage prepaid, to Thomas P. Lordeon and Robert M. Clyde, Jr., and Fred A. Culver, Attorneys for Plaintiff at 804 Central Tower Building, Youngstown, Ohio 44503.

I further certify that all parties required to be served have been served.

RICHARD A. SZILAGY,
Assistant Attorney General
Ohio Bureau of Employment Services
145 South Front Street
Columbus, Ohio 43215
614/466-2707

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants

CIVIL ACTION NO. C 75-15 Y

MOTION TO CERTIFY THE RECORD AND TRANSMIT TO THE UNITED STATES SUPREME COURT

The defendants, Ohio Bureau of Employment Services and Albert G. Giles, intend to file in the Supreme Court of the United States a Notice of Appeal for a review of the order and judgment entered in the above-entitled proceeding.

The defendants accordingly request that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States, a copy of the entire record that was before this court in the above captioned case, including the opinion, order and judgment of this court.

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RICHARD A. SZILAGY,
Assistant Attorney General
Ohio Bureau of Employment Services
145 South Front Street
Columbus, Ohio 43215
614/466-2707
Attorneys for Defendants

TABLE 405.--DISQUALIFICATION FOR UNEMPLOYMENT CAUSED BY LABOR DISPUTE

State	Duration of disqualification			Disputes excluded if caused by--			Individuals are excluded if neither they nor any of the same grade or class are--		
				Employer's failure to conform to--					
	During stoppage of work due to dispute (29 States)	While dispute in active progress (12 States)	Other (11 States)	Contract (4 States)	Labor law (4 States)	Lockout (16 States)	Participating in dispute (43 States)	Financing dispute (30 States)	Directly interested in dispute (43 States)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Ala.	. . . .	X	. . .	. . . .	. . . .	. . . . .	. . . . .	. . . .	. . . . .
Alaska	X	. . . .	X[1]	X	X	. . . . .	X	. . . .	X
Ariz.	. . . .	. . . .	X[2]	X	X	. . . . .	X	X	X
Ark.	. . . .	. . . .	X[2]	. . . .	. . . .	X	X	. . . .	X
Calif.	. . . .	X	. . .	. . . .	. . . .	X[2]	. . . . .	. . . .	. . . . .
Colo.	. . . .	. . . .	X[2]	. . . .	. . . .	X[2][10]	X	X	X
Conn.	. . . .	. . . .	X[2]	. . . .	. . . .	X	X	X	X
Del.	X	. . . .	. . .	. . . .	. . . .	. . . . .	. . . . .	. . . .	. . . . .
D.C.	. . . .	X	. . .	. . . .	. . . .	. . . . .	X	. . . .	X
Fla.	. . . .	X	. . .	. . . .	. . . .	. . . . .	X	X	X
Ga.	X[2][3]	. . . .	. . .	. . . .	. . . .	X	X	X	X
Hawaii	X	. . . .	. . .	. . . .	. . . .	. . . . .	X	. . . .	X
Idaho	. . . .	. . . .	X[2]	. . . .	. . . .	. . . . .	X	X[4]	X
Ill.	X[2][5]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Ind.	X[2][5]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Iowa	X	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X[2]
Kans.	X	. . . .	. . .	. . . .	. . . .	. . . . .	X[2]	X	X
Ky.	. . . .	X	. . .	. . . .	. . . .	X	. . . . .	. . . .	X[4]
La.	. . . .	X	. . .	. . . .	. . . .	. . . . .	X[4]	. . . .	X
Maine	X[2]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Md.	X	. . . .	. . .	. . . .	. . . .	X	X	X	X
Mass.	X[2][7]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Mich.	. . . .	. . . .	X[2]	. . . .	. . . .	X[2][9]	X[4]	X[4]	X[4][8]
Minn.	. . . .	X	. . .	. . . .	. . . .	X	X[2][6]	. . . .	X[2][8]
Miss.	X	. . . .	. . .	. . . .	. . . .	X	X	. . . .	X

(Table continued on next page)

TABLE 405.--DISQUALIFICATION FOR UNEMPLOYMENT CAUSED BY LABOR DISPUTE (CONTINUED)

State	Duration of disqualification			Disputes excluded if caused by--			Individuals are excluded if neither they nor any of the same grade or class are--		
				Employer's failure to conform to--					
	During stoppage of work due to dispute (29 States)	While dispute in active progress (12 States)	Other (11 States)	Contract (4 States)	Labor law (4 States)	Lockout (16 States)	Participating in dispute (43 States)	Financing dispute (30 States)	Directly interested in dispute (43 States)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Mo.	X[2]	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
Mont.	X	. . . .	. . .	. . . .	X	. . . .	X	X	X
Nebr.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
Nev.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	X	X
N.H.	X[2][3]	. . . .	. . .	X	. . . .	X	X	X	X
N.J.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
N.Mex.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	. . . .	X
N.Y.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	. . . . .	. . . .	. . . . .
N.C.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	. . . . .	. . . .	. . . . .
N.Dak.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	. . . .	X
Ohio	. . . .	. . . .	X[2][10]	. . . .	. . . .	X	. . . . .	. . . .	. . . . .
Okla.	X	. . . .	. . .	. . . .	. . . .	X	X	. . . .	X
Oreg.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	X	X
Pa.	X	. . . .	. . .	. . . .	. . . .	X	X	. . . .	X
P.R.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	. . . .	X
R.I.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	X[4]	X[4]	X[4]
S.C.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	X[4]	X
S.Dak.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
Tenn.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	. . . .	X
Tex.	X[2]	. . . .	. . .	. . . .	. . . .	. . . .	X[2]	X[2]	X[2]
Utah	X[2][10]	. . . .	. . .	. . . .	X	X[2]	. . . . .	. . . .	(2)[4]
Vt.	X	. . . .	. . .	. . . .	. . . .	. . . .	X[4]	X[4]	X[2][4]
Va.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	X	X	X
Wash.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
W.Va.	X[2][11]	. . . .	. . .	X[2]	. . . .	X	X	X	X
Wis.	. . . .	X	. . .	. . . .	. . . .	. . . .	. . . . .	. . . .	. . . . .
Wyo.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X

(Footnotes on next page)

ELIGIBILITY

(Footnotes for Table 405)

1/ So long as unemployment is caused by existence of labor dispute.

2/ See text for details.

3/ By judicial construction of statutory language.

4/ Applies only to individual, not to others of same grade or class.

5/ Disqualification is not applicable if claimant subsequently obtains covered employment and: earns 8 x wba or has been employed 5 full wks., Maine; earns at least $900, Mass.; works at least 5 consec. wks. in each of which claimant earned 120% of wba, N.H.; earns $700 with at least $20 in each of 19 different calendar wks., Utah. However, BPW earned from ER involved in the labor dispute cannot be used to pay benefits during such labor dispute, Mass. and Utah.

6/ Fixed period: 7 consec. wks. and the waiting period or until termination of dispute, N.Y.; 6 wks. and waiting period, R.I. See Table 303 for waiting period requirements.

7/ So long as unemployment is caused by claimant's stoppage of work which exists because of labor dispute. Failure or refusal to cross picket line of to accept and perform available and customary work in the establishment constitutes participation and interest.

8/ Disqualification is not applicable if employees are required to accept wages, hours, or other conditions substantially less favorable than those prevailing in the locality or are denied the right of collective bargaining.

9/ Disqualification not applicable to any claimant who failed to apply for or accept recall to work with an ER during a labor dispute work stoppage if claimant's last separation from ER occurred prior to work stoppage and was permanent.

10/ Applicable only to establishments functionally integrated with the establishments where the lockout occurs, Mich. Employee not ineligible: unless the lockout results from demands of employees as distinguished from an ER effort to deprive the employees of some advantage they already possess, Colo.; if individual was laid off and not recalled prior to the dispute, if separated prior to the dispute, if obtained bona fide job with another ER while dispute was in progress, Ohio; if the ER was involved in fomenting the strike, Utah.

11/ Disqualification ceases: when operations have been resumed but individual has not been reemployed, Ga.; within 1 wk. following termination of dispute if individual is not recalled to work, Mass. If the stoppage of work continues longer than 4 wks. after the termination of the labor dispute, there is a rebuttable presumption that the stoppage is not due to the labor dispute and the burden is on the ER to show otherwise, W.Va.

12/ Disqualification limited to 1 wk. for individuals not participating in nor directly interested in dispute.

ELIGIBILITY

CERTIFICATION OF STATES OF THE SECRETARY OF THE TREASURY

In accordance with the provisions of section 3304(c) of the Internal Revenue Code of 1954 (26 U.S.C. 3304 (c)), I hereby certify the following named States to the Secretary of the Treasury for the 12-month period ending October 31, 1975, in regard to the unemployment compensation laws of those States which heretofore have been approved under the Federal Unemployment Tax Act.

Alabama	Kentucky	Ohio
Alaska	Louisiana	Oklahoma
Arizona	Maine	Oregon
Arkansas	Maryland	Pennsylvania
California	Massachusetts	Puerto Rico
Colorado	Michigan	Rhode Island
Connecticut	Minnesota	South Carolina
Delaware	Mississippi	South Dakota
District of Columbia	Missouri	Tennessee
Florida	Montana	Texas
Georgia	Nebraska	Utah
Hawaii	Nevada	Vermont
Idaho	New Hampshire	Virginia
Illinois	New Jersey	Washington
Indiana	New Mexico	West Virginia
Iowa	New York	Wisconsin
Kansas	North Carolina	Wyoming
	North Dakota	

Signed at Washington, D.C. this 31st day of October, 1975.

JOHN T. DUNLOP,
Secretary of Labor

(FR Doc. 75-29727 Filed 11-4-15; 8:45am)
Federal Register, Vol. 40 No. 214 — Wednesday, November 5, 1975, Page 51520.

MOTION FILED

MAY 27 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY, *Appellee.*

On Appeal from the United States District Court Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OCTOBER TERM, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY, *Appellee.*

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

The Chamber of Commerce of the United States of America respectfully moves for leave to file the attached brief *amicus curiae* on behalf of Appellants in the present case, pursuant to Rule 42 of the Rules of this Court. Counsel for Appellant has given consent for this filing.

1. The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700)

state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organization in the United States.

2. In order to represent its members' views on questions of importance to their vital interest and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* (and as a party) in a wide range of significant labor relations matters before this Court; *e.g. Super Tire Enginering Co., et al.* v. *McCorkle, et al.,* 416 U.S. 115 (1974); *The Chamber of Commerce of the United States of America, Petitioner* v. *Robert Francis, et al., Respondent,* Petition for Writ of Certiorari pending; *Geduldig* v. *Aiello, et al.,* 417 U.S. 484 (1974); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.,* No. 73-1256; *Boy's Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.,* 397 U.S 99 (1970)

3. The underlying question presented in this case is whether a state may provide financial support to one of the parties to a labor dispute—the union—by granting public benefits to workers temporarily idled as a direct result of such a dispute. This case, then, is another in the growing list of decisions involving the issue of whether public funds may be provided to workers participating in or affected by a labor controversy.

The Chamber's concern about the manner in which this question will be resolved is evinced by its repeated participation in litigation presenting this issue. Thus, the Chamber has participated as *amicus curiae* before this Court in *Super Tire, supra,* and as a party before various lower courts.[1] Indeed, the Chamber has been the only party who has consistently litigated the questions presented by this cause and is therefore uniquely able to contribute to their resolution.[2]

Respectfully submitted,

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---

[1] The Chamber was permitted to intervene and participate in the evidentiary hearing in *Hawaiian Telephone Company,* 378 F. Supp. 794 (D. Hawaii). The Chamber was permitted to intervene in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (CA 1, 1973) *cert. den.* 414 U.S. 858 (1973); *Russo* v. *Kirby,* 453 F.2d 548 (CA 2, 1971); *U.S. Chamber of Commerce* v. *Francis* (CA 4 No. 74-1991); and, over opposition the Chamber has been permitted to participate as a party-plaintiff in pending proceedings in *Dow Chemical Co. and the Chamber of Commerce of the United States of America* v. *Taylor,* 57 F.R.D. 105 (E.D. Mich. Civil No. 38664).

[2] The Third Circuit in *Super Tire* observed that the Chamber, while not designated as a formal party, was the *real* party in interest whose presence indicated an ongoing interest in the issues raised in that litigation. *Super Tire* raised issues that are closely related to the issues presented in the instant case.

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IN THE

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OCTOBER TERM, 1975

No. 75-1707

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**On Appeal from the United States District Court
Northern District of Ohio, Eastern Division**

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

A. This Case Together with The Chamber of Commerce of the United States of America v. Francis, et al., and Kimbell, Inc., et al. v. Employment Security Commission of the State of New Mexico, Present Significant Unanswered Questions Concerning the Permissibility of Public Assistance to Strikers and to Persons Idled as a Consequence of a Strike.

The question presented in this case is whether a state's statute denying unemployment compensation benefits to non-striking employees who are laid off solely because of a strike contravenes the United State's Constitution. This case is one of the genre that involves questions raised by the grant or denial of public subsidies to striking employees or to those who, as here, are laid off directly because of a labor dispute. These cases have continued to occupy the

attention of lower courts and commentators down through the years.[1] This Court has not, as yet, addressed these significant questions.[2]

Indeed, pending before this Court are petitions in two cases that present questions similar to that raised by this case: *The Chamber of Commerce of the United States of America* v. *Francis* (Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit pending); *Kimbell, Inc., et al.* v. *Employment Security Commission of the State of New Mexico, et al.* (Jurisdictional Statement pending). In *Francis* the question is:

[1] *E.g., I.T.T. Corp.* v. *Minter,* 435 F.2d 909 (1st Cir.), *cert. denied,* 402 U.S. 933, *rehearing denied,* 404 U.S. 874 (1971); *National Gypsum Co.* v. *Administrator, La. Dept. of Employment Security,* 313 So.2d 527 (La. Sp. Ct. 1975), *appeal dismissed* 44 U.S.L.W. 3340 (December 9, 1915) (No. 75-299); *Kansas City Star Co.* v. *Dept. of Industry, Labor and Human Relations,* 211 N.W.2d 488 (Wis. Sup. Ct. 1973), *rehearing denied,* 217 N.W.2d 666 (1947)), *cert. denied,* 419 U.S. 870 (1974); see also *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973); *Hawaiian Telephone Co., et al.* v. *Hawaii,* 405 F. Supp. 275 (D. Hawaii, 1976); *Johns-Manville Prods.* v. *Doyal,* 510 F.2d 1196 (5th Cir. 1975); Thieblot and Cowin, *Welfare and Strikers; The Use of Public Funds to Support Strikers,* Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania Press (1972); Carney, *The Forgotten Man on the Welfare Roll: A Study of Public Subsidies for Strikers,* Washington University Law Quarterly, Volume 1973, Number 3.

[2] In *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974) this Court recognized the significance of these questions and observed:

> "It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of law regulating labor-management disputes."

> "Whether striker eligibility for welfare benefits is contrary to and inconsistent with the purpose of the Social Security Act and contrary to national labor policy expressed in the National Labor Relations Act."

In *Kimbell* the issue presented is:

> "Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?"

In *Francis,* an employee of American Smelting and Refining Co., Robert Francis, joined a strike against that employer in support of his collective bargaining representative. While on strike Francis sought unemployment benefits. The State of Maryland denied Francis' application for these benefits on the ground that his unemployment was voluntary and resulted from his decision to participate in a strike. Francis then applied for federal benefits under the Aid for Dependent Children—Unemployed Father program (AFDC-UF). Decisions below resulted in striking employees—whose need for assistance arose only because of their decision to strike—being unqualifiedly enrolled in the AFDC-UF program.[3]

In *Kimbell,* as in *Francis,* during a strike occasioned by a bargaining dispute, employes, striking to support their union's bargaining demands, applied for unemployment compensation benefits. Unlike Francis, these strikers were granted these benefits by

[3] See the Petition for Writ of Certiorari in *Francis,* pp. 2-6.

the State of New Mexico and these grants were upheld by that State's Supreme Court.[4] That court refused to follow an earlier decision of a federal district court in *Hawaii Telephone Co., et al.* v. *Hawaii,* 405 F. Supp. 275 (D. Hawaii, 1976). The *Hawaii* court had held that the State of Hawaii's award of unemployment compensation benefits to strikers impermissibly altered the relative economic strength of union versus employer in their bargaining relationship and thereby encroached upon the field preempted by the National Labor Relations Act in contravention of the Constitution's supremacy clause.

In the instant case, employee Hodory was one of approximately 1250 employees laid off by U.S. Steel or Republic Steel Corporation at their Ohio plants because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two employers. Hodory applied to the State of Ohio for unemployment benefits. His application was denied by that State pursuant to § 4141.29(D)(1)(a) of the Ohio Revised Code.

> "(a) *His unemployment was due to a labor dispute* other than a lockout *at any factory, establishment, or other premises* located in this or any other state and *owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute . . .*" (emphasis supplied).[5]

---

[4] See Jurisdictional Statement in *Kimbell.*

[5] During the pendency of this lawsuit § 4141.29(D)(1(a) O.R.C. was amended to provide, in pertinent part, that:

> ". . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . ."

This amendment, Am. Sub. Senate Bill 173, however, did not become effective until December 2, 1975, and is not to be retroactively applied. Moreover, the amendment does not moot the issues raised herein, since it will not affect the status of plaintiff and the class for the period during which they were denied benefits pursuant to § 4141.29(D)(1)(a).

The sole basis for denying Hodory's application for benefits during the strike was that he was eligible under the labor dispute disqualification in § 4141.29 (D)(1)(a) O.R.C.

The court below held that the application of this disqualification to deny benefits to individuals who were unemployed through no fault of their own and who did not participate in or benefit from a labor dispute involving another union and their employer violated the Constitution.

In reaching its conclusion, the *Hodory* court observed that the labor dispute disqualification, if applied to employees who strike to support bargaining demands, would be Constitutional, since the grant of public benefits to those strikers would place their employer at an unfair disadvantage in negotiations with their union. The court apparently recognized that the payment of public benefits to strikers reduces economic pressure on them and accordingly diminish their incentive to reach a fair settlement. Moreover, employers aware of the availability of public benefits for strikers are more likely to accept union demands that

are unreasonable and economically unsound, because these employees realize that the union and its members—assisted by public funds—have little to lose by a long strike.

B. The Decision Below, Like the Decisions in Francis and Kimbell, Is Contrary to National Labor Policy and, Like the Decision in Kimbell Contravenes the Supremacy Clause.

Francis and *Kimbell* directly focus upon the issues involved when federal or state funds are granted (*Kimbell*) or denied (by the State in *Francis*) to employees striking to support collective bargaining demands. The instant case brings to this Court a variant of these questions since the State of Ohio has elected to deny benefits not only to strikers, but also to other persons idled as a direct consequence of a strike.

As stated, the court below in this case appears to support the position that its is constitutionally permissible to deny public funds to *strikers*. This position is consistent with the views advanced by the Chamber in *inter alia Francis, supra,* and *Hawaii Telephone, supra:* the Chamber has contended consistently that federal labor and welfare policy—and the operation of the Supremacy Clause—have determined that strikers are not eligible for federal or state subsidies in the form of unemployment or welfare benefits.[6]

[6] This Court has previously observed that as a matter of law the question of the permissibility or impermissibility of public assistance to strikers is to be resolved by reference to *national labor policy:*

> "The question, of course, is whether Congress, explicitly or implicitly has ruled out such assistance in its calculus of law regulating labor-management disputes."

There can be no cavil over the proposition that the national policy of free collective bargaining is the cornerstone of the federal labor relations system embodied in the NLRA (29 U.S.C. § 161 *et seq.*). This Court has consistently recognized that the resolution of labor disputes must depend solely upon the strength and resolve of the contesting private parties. In *N.L.R.B.* v. *Insurance Agents Union,* 361 U.S. 477, 489 (1960), this Court observed that the federal scheme of labor relations requires that a collective bargaining relationship involve a "brute contest of economic power." Similarly, in *H. K. Porter* v. *N.L.R.B.,* 397 U.S. 99, 108 (1970), this Court stated that ". . . the results of the contest [are to be left] to the bargaining strengths of the parties."

The foregoing demonstrates that the national labor policy mandates that the resolution of labor controversies depends upon the strength and tenacity of the bargaining parties themselves. Thus, under the federal scheme of labor relations, each bargaining party recognizes that he will be required to endure the immediate and future consequences of a continued disagreement, a strike or a lockout, and that this cost to him may exceed the expense of compromise and agreement. As long as the parties recognize that they alone must bear the risks attendant to intransigence and the utilization of economic force, the collective bargaining process will continue to produce the voluntary compromises that Congress intended.[7] It follows

[7] The legislative history is replete with references to such congressional intent. Senator Taft stated:

> "Our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels he can make

that federal labor policy interdicts public financial support during a labor dispute for one or the other of the bargaining parties, since this support, by relieving an intractable party of the cost of a prolonged disagreement, will in effect forestall voluntary compromise.[8]

The foregoing demonstrates that the Supremacy Clause prohibits a *state* from utilizing its funds to

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an unreasonable demand and get away with it. . . . If there is reasonable equality at the bargaining table, I believe there is much more hope for labor peace." I NLRB Legislative History of the Labor Management Relations Act at 1007 (1947).

As this Court observed in *Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959):

". . . The goal of federal labor policy . . . is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective bargaining, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife . . ."

As Mr. Justice Frankfurter stated:

"[The NLRA] leaves the adjustment of industrial relations to the free play of economic forces (and) seeks to assure that the play of those forces be truly free." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 183 (1941).

[8] The comprehensive study of Thieblot and Cowin, *Welfare and Strikers: The Use of Public Funds to Support Strikers*, Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania Press (1972), similarly observed:

"The overwhelming weight of opinions unearthed by our studies, including those of strikers, union officials, and management personnel, was that the payment of tax supported benefits to strikers, by greatly reducing the economic pressure on those strikers, substantially diminished the back pressures from union members to settle and thereby made strikes last longer. Moreover, it seemed clear in the case studies that strike settlements were made more costly as managements, realizing what was occurring, paid more dearly to end the dispute," at 218.

provide public assistance to persons who engage in a strike to support a labor dispute. *Local 20, Teamsters* v. *Morton*, 377 U.S. 252 (1964); *Hill* v. *Florida*, 325 U.S. 538 (1944); *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963).[9]

Accordingly, insofar as the Ohio statute involved in this case is applied to *strikers*, it is consistent with federal policy.

Furthermore, for reasons advanced by the State of Ohio, the payment of state benefits to persons idled as a direct consequence of a labor dispute—as ordered by the court below—transgresses the Supremacy Clause. It follows that the determination of the State to disqualify such persons is not unconstitutional.

The instant case, *Francis* and *Kimbell* considered together present significant and recurring questions which this Court has not considered.[10] Lower courts have reached different results when examining these questions,[11] and important constitutional issues and federal policies are involved. Accordingly, review of these questions is timely and this case, together with *Francis* and *Kimbell* provide ready vehicles to embark upon this review.

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[9] This conclusion is unaffected by the fact that a state's policy in granting state funds to strikers is not intended to be a subsidy for them. This Court has held that the applicable standard for determining the validity of state legislative policy is whether the law impedes the accomplishment of a federal purpose; if it does, the intent or objective of the state policy is irrelevant. *Perez* v. *Campbell*, 402 U.S. 637 (1971); *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1962); *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

[10] See note 1, *supra*.

[11] Compare for example *Hawaii Telephone, supra*, with the instant case and *Kimbell*.

CONCLUSION

Accordingly, for the reasons set forth above as well as those advanced by the State of Ohio, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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JUN 4 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Appellants

VS.

LEONARD PAUL HODORY,
Appellee

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE PRIOR TO CONSIDERATION OF JURISDICTIONAL STATEMENT AND BRIEF FOR REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

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IN THE

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October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
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Appellants

VS.

LEONARD PAUL HODORY,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE PRIOR TO CONSIDERATION OF JURISDICTIONAL STATEMENT

Republic Steel Corporation respectfully moves for leave to file a brief amicus curiae pursuant to Rule 42(1). Attorney for appellent has consented to the filing of such a brief, atttorneys for appellee have not. Its brief is in support of the position of appellant.

Republic Steel Corporation has an interest in this case. The decision of the Three Judge District Court allowed unemployment benefits to some five hundred eighty of its employees, included as a part of the class

with Hodory, Appellee herein, whose claims for benefits had been denied by the administrator of the Ohio Bureau of Employment Services.

Under Ohio law, (Sec. 4141.28(G) (4) R.C.) benefits paid to Republic Steel Corporation's employees are charged to its account with the Bureau and under the state's experience rating system will be paid by Republic Steel Corporation through an increase in its payroll tax for unemployment compensation.

The decision of the administrator of the Ohio Bureau of Employment Services denying benefits to the plaintiffs-appellees was appealed to the Board of Review where the claims are now pending but are being stayed pending a final decision in this case.

Republic Steel Corporation is an interested party in these cases now under appeal with the Board of Review. (Sec. 4141.01 and Sec. 4141.28 Revised Code of Ohio)

Plaintiffs-appellees have an adequate remedy under state law which they have not xhausted.

Republic Steel Corporation was not made a party in the instant case, was denied an opportunity to appear and present evidence as to the economic impact on it resulting from the payment of benefits and has not yet been permitted to intervene. This constitutes a denial of due process under the Fifth Amendment.

Although Republic Steel Corporation supports the arguments and conclusions contained in the excellent Brief of the Attorney General on behalf of the appellants herein, the interests of the Bureau of Employment Services cannot be the same as that of the Republic Steel Corporation and therefore its interests

are not adequately represented by the appellants in this case.

The principle that a governmental agency cannot adequately represent the interests of a private party has been expressed in the case of *Trbovich v United Mine Workers*, 404 N.S. 528, at 538 (1972).

For the foregoing reasons, Republic Steel Corporation respectfully requests that this motion for leave to file the annexed brief amicus curiae be granted.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
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VS.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

This brief is submitted in support of the Jurisdictional Statement of the Appellants, Ohio Bureau of Employment Services and Albert G. Giles, Administrator.

I. STATEMENT OF THE CASE AND FINDING OF FACTS

Republic Steel Corporation agrees with the Statement of the Case, Finding of Facts and Questions Presented which have been stated in the Jurisdictional

Statement of the Appellants and are not repeated here.

II. REPUBLIC STEEL CORPORATION HAS A VERY REAL AND DIRECT INTEREST IN THIS CASE

Claims for unemployment benefits by some five hundred eighty employees of Republic Steel Corporation, included in the class with Hodory, appellee herein, were denied by the administrator of the Ohio Bureau of Employment Services. Under the decision of the Three Judge District Court benefits would be allowed in these Cases and would be charged to the account of Republic Steel Corporation on the books of the Ohio Bureau of Employment Services. (Sec. 4141.28 of Ohio Revised Code)

Under the experience rating provisions of the Ohio Unemployment Comepnsation law these benefits would be paid by Republic Steel Corporation through an increase in its payroll taxes for unemployment compensation purposes.

III. ARGUMENT

DUE PROCESS HAS BEEN DENIED REPUBLIC STEEL CORPORATION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The plaintiff-appellee herein did not name Republic Steel Corporation a defendant in this case although several hundred of its employees were included in the class which plaintiff-appellee claims to represent. As stated above, Republic Steel's financial interests are materially involved in any decision in this case.

Consequently no opportunity was afforded Republic Steel Corporation to appear or submit evidence before the Three Judge District Court showing its interest and the financial impact on its account with the Ohio Bureau of Employment Services. A Motion to Intervene filed with the Federal District Court has not been allowed at this time.

The Ohio law at Sec. 4141.28 Revised Code made Republic Steel Corporation an interested party in these cases at the state administrative level thereby being entitled to notice and an opportunity to particiipate at each step in the proceedings including the right to appeal to the state courts.

These cases are now pending with the Board of Review of the Ohio Bureau of Employment Services.

DENYING UNEMPLOYMENT BENEFITS FOR UNEMPLOYMENT DUE TO A LABOR DISPUTE IS A LEGITIMATE, REASONABLE AND NECESSARY STATE PURPOSE AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT NOR THE PROVISIONS OF THE FEDERAL SOCIAL SECURITY LAW.

The long and intersting history of labor dispute provisions in unemployment compensation laws, going back to early British law, has been described in some detail in the Brief of the Attorney General of Ohio on behalf of the Ohio Bureau of Employment Services.

The strong and well identified thread running through the entire history of this type of legislation is one of "neutrality" on the part of the government in labor disputes.

When the Social Security Laws were first enacted in August, 1935, encouraging the states to pass their own unemployment compensation laws, wide latitude was given the states in the type of law they might adopt.

This was particularly true in the areas of coverage, conditions of eligibility and the disqualifications of claimants for benefits.

For example, only employers of eight or more employees were covered under the original federal and state law. Agricultural labor, domestic service, public employees and many other types of workers were excluded from the program. This was considered a reasonable and necessary discrimination to accomplish a valid state purpose.

Only a few basic provisions in a state law are required by Title III for the Certification by the Secretary of Labor for entitlement of administrative funds for the operation of a state unemployment compensation law. These include provisions for

(1) Insuring that full benefits will be paid when due.
(2) Payment of benefits through public employment offices.
(3) Opportunity for a fair hearing.
(4) The deposit of all contributions with the Secretary of the Treasury of the United States.
(5) The expenditure of all money withdrawn from the Treasurer for the sole purpose of paying unemployment benefits.

None of the above conditions have been violated by the Ohio law and all its present provisions have been so certified by the Secretary of Labor.

From its inception in December, 1936, the Ohio law has contained a provision in one form or another denying benefits to employees whose unemployment is due to a strike or labor dispute. The Ohio legislature has consistently adhered to the policy of "state neutrality" in labor disputes.

At the time the instant case arose the Ohio law provided that no individual may serve a waiting period or be paid benefits for any week with respect to which the administrator finds that:

> "(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor disputes." (Sec. 4141.29(D)(1)(a) Ohio Revised Code.)

This is a reasonable classification and distinction within the discretionary powers vested in the state.

PAYING BENEFITS FOR UNEMPLOYMENT DUE TO A LABOR DISPUTE VIOLATES A STATE'S OBLIGATION TO MAINTAIN NEUTRALITY IN LABOR DISPUTES, AND WOULD WRONGFULLY INVADE THE FIELD OF LABOR RELATIONS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT GUARANTEEING FREE COLLECTIVE BARGAINING.

The case of *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, United States District Court, District of Hawaii, Civil No. 74-140 (10-1-75) supports the principal that

it is a state's obligation to maintain neutrality in labor disputes.

The present Ohio labor dispute provision is obviously an expression by the legislature evidencing this intent.

It is claimed by the plaintiff-appellee in this case however that the legislature has over-stepped its bounds by denying benefits for unemployment due to a labor dispute where the claimants are not actually participating in the dispute.

What constitutes remaining "neutral?" Clearly if a state imposes a tax or other financial obligation upon the employer because of a labor dispute with which he otherwise would not be burdened it is not remaining neutral.

Unemployment benefits paid to an employer's workers who are unemployed due to a labor dispute but who are not actually participating in the dispute is an equally effective weapon to be used against the employer at the bargaining table as benefits paid to those actually participating.

It is the total financial hardship which the state would impose upon him which weakens or destroys his ability to bargain on an equal basis which is paramount.

It cannot be disputed that unemployment benefits paid to an employer's workers become a financial obligation to the employer through the state's experience rating system.

For example in the case of *Abernathy v. Eastern Air Lines*, 259 N.C. 190, 130 S.E. 2d 292, (1963), Certiorari denied, U.S. Sup. Ct. 375 U.S. (1963), a relatively few flight engineers of Eastern Air Lines,

Inc. went on strike causing several thousand of its employees to lose their employment due to the labor dispute.

If these thousands of employees not participating in the dispute, but whose unemployment was due to the dispute, were to be paid unemployment benefits and charged to Eastern's account, it is safe to say that the pressure upon Eastern's representatives at the bargaining table would be devastating. Free collective bargaining as assured by the National Labor Relations Act would be impossible.

THIS COURT HAS SPOKEN ON THE ISSUE IN THIS CASE IN DENYING CERTIORARI IN A CASE INVOLVING THE CONSTITUTIONALITY OF LABOR DISPUTE PROVISIONS SUBSTANTIALLY THE SAME AS THOSE IN THE INSTANT CASE.

In *Abernathy* supra, this Court had before it a decision of the Supreme Court of North Carolina holding valid a provision in the North Carolina Unemployment Compensation law which denies benefits in labor dispute cases under situations almost identical to those in the present case.

The *Abernathy* case arose in 1962 several months after the North Carolina General Assembly amended its labor dispute provision, effective July 1, 1961, to read as follows:

> "An individual shall be disqualified for benefits . . .
>
> "(4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is

> or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit." (G.S. 96-14(4) N.C.)

We quote the pertinent provisions of both the Ohio and North Carolina laws to show the similarity of purpose even though slightly different language is employed.

It is important to note here that prior to its amendment effective July 1, 1961, the North Carolina labor dispute provision did not deny benefits if it were shown that the individual was not participating, financing or interested in the labor dispute.

Approximately a year after its enactment on July 1, 1961, this amendment was challenged in the North Carolina Courts on the grounds that it constituted an unlawful discrimination in violation of the State and Federal Constitutions—the same grounds that are being advanced in the instant case.

The Supreme Court of North Carolina in upholding the validity of the amendment in question stated in pertinent part:

". . . in passing the 1961 amendment the North Carolina General Assembly acted within its constitutional powers. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment and its action within its range of discretion cannot be set aside because compliance is burdensome" (Citations omitted) . . .

"The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualifications contained in the 1961 amendment involves a question of degree and not of principle."

This court denied certiorari in the North Carolina Case December 2, 1963. U.S. Sup. Ct. 375 U.S. 161.

CONCLUSION

It is submitted that Republic Steel Corporation has a very real and genuine financial interest in the outcome of this case.

It is further submitted that Due Process under the Fifth Amendment has been denied Republic Steel Corporation.

It is further submitted that denying unemployment benefits for unemployment due to a labor dispute is a legitiment state purpose.

It is further submitted that paying benefits for unemployment due to a labor dispute violates the state's obligation to maintain neutraliy in labor disputes.

This Court has denied Certiorari in a case involving the constitutionality of a North Carolina statute containing substantially the same provisions at issue in the present case.

For the above reasons Republic Steel Corporation as amicus curiae urges this Court to reverse the Three Judge District Court's decision in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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IN THE
UNITED STATES SUPREME COURT

NO. .....

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants

v.

LEONARD PAUL HODORY,
Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR UNITED STATES STEEL CORPORATION AS AMICUS CURIAE

United States Steel Corporation respectfully moves for leave to file a brief *amicus curiae*. Appellants have consented to the filing of such a brief. Appellee has not.

United States Steel Corporation had no knowledge of the existence of this litigation until the three-Judge panel's decision was reported in various newspapers. On April 28, 1976, it filed a motion to intervene in the United States District Court which was denied on May 26, 1976 on the grounds that United States Steel Corporation had adequate notification about the case from the newspapers and on the grounds that the district court lacked jurisdiction to entertain the motion since an appeal had been taken. Therefore, a brief *amicus curiae* is the only way United States Steel Corporation now can be heard.

The order of the three-Judge panel in this case requires the Ohio Bureau of Employment Services to pay unemployment compensation benefits to plaintiff Hodory, an employee of United States Steel Corporation, and several hundred other of its employees as the members of a class.

United States Steel Corporation is a registered employer with about 17,000 employees located in Ohio. It is subject and is in full compliance with the Ohio Unemployment Compensation Act.

Under the provisions of the Ohio Unemployment Compensation Act which establishes a merit rating system for the payment of contributions by Ohio employers, United States Steel Corporation in effect will pay the benefits ordered to be paid—approximately $316,000. See Section 4141.25 of the Revised Code of Ohio.

Further, under Ohio law, United States Steel Corporation is an interested party. It is entitled to notice of proceedings before the state unemployment compensation agency which involve its employees and the potential charges against it for payment of benefits to such employees. It has certain appeal rights which it exercised on the claims at issue here which were allowed by the Ohio agency. See Sections 4141.01(I) and 4141.28 of the Revised Code of Ohio. These appeals are still pending before the Ohio Board of Review awaiting the final order in this case before being processed further. Also, there are other claims by employees of United States Steel Corporation which were denied by the Ohio agency and which also would be affected by the order of the three-Judge panel in the event it becomes final.

The proprietary interest of United States Steel Corporation in the Ohio unemployment compensation fund is substantial and it should be heard in this case. See *Carnegie-Illinois Steel Corporation v. Review Board,* 117 Ind. App. 379, 72 N.E. 2d 662 (1947). Carnegie-Illinois Steel Corporation is now a part of United States Steel Corporation.

The interests of United States Steel Corporation are not adequately represented by the appellants. The interests of the appellants are to see that the laws of the State of Ohio are enforced. They have no particular interest in whether or not the employees of United States Steel Corporation receive benefits. *Trbovich v. United Mine Workers,* 404 N.S. 528, 538-9(1972), has established the principle that a governmental agency cannot adequately represent the interest of a private party. It is only by coincidence that the appellants are to be considered generally on the same side of the issues herein as United States Steel Corporation.

The lack of notice to United States Steel Corporation of the pendency of the proceedings before the three-Judge panel raises a question of due process under the Fifth Amendment. The decision of the three-Judge panel on the constitutionality of this labor dispute disqualification was improper and should be reversed.

Accordingly, we repectfully request that the Court grant United States Steel Corporation's motion for leave to file the brief *amicus curiae* which is attached hereto.

.....

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IN THE
UNITED STATES SUPREME COURT

NO. .....
OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants
v.
LEONARD PAUL HODORY,
Appellee

BRIEF FOR UNITED STATES STEEL CORPORATION AS AMICUS CURIAE

The Memorandum Opinion of the three-Judge panel below is based on the following conclusions:

1. The financial interest of an Ohio employer in the state's unemployment compensation fund is not significant in a labor dispute unless the employer has reached a financial crisis.

The lower court stated on page 11 of its Opinion that

"Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a *financial crisis*, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to *prevent bankruptcy*." [Underscoring supplied]

2. The state unemployment compensation laws may deny benefits to claimants otherwise eligible and qualified only if they are voluntarily unemployed. See pp. 8 and 9 of the Opinion. If they are involuntarily unemployed, otherwise eligible and qualified, denial of

benefits is discriminatory, a denial of equal protection, and "violates plaintiff's right to due process of law guaranteed by the 14th Amendment and 42 U.S.C. ¶1983." See pp. 8, 9, 10 and 11 of the Opinion.

Recognition of the erroneous reasoning in either one of the above will be fatal to the order of the three-Judge panel below.

If the financial interest of United States Steel Corporation is significant, then the decision below violates the Fifth Amendment because United States Steel Corporation was not made a party. If it is valid for a state to deny benefits to claimants in a labor dispute situation for weeks in which they are involuntarily unemployed, then there is no discrimination nor denial of due process.

1. The Financial Interest of United States Steel Corporation Is Significant and Substantial. Failure to Recognize It Violates the Fifth Amendment.

The appellee, Hodory, was an employee of United States Steel Corporation at the time of his separation from work on November 12, 1974. He was one of 1,402 employees who were laid off by United States Steel Corporation because of a strike in coal mines owned by United States Steel Corporation in a state other than Ohio. The average weekly benefit amount of such employees is $100. The duration of their unemployment was for a total of 3163 weeks. Using these figures, the potential charges to the Ohio unemployment compensation account of United States Steel Corporation will be approximately $316,000.00.

Under the merit rating system in effect in Ohio, each employer is expected to pay the benefits paid to its employees. Since the time Ohio benefits began to be paid in 1939, United States Steel Corporation has paid into the Ohio unemployment compensation fund sufficient amounts to pay the claims of its employees from 1939 to the present time. It is reasonable to assume that it will be in existence and contributing to the Ohio fund in the next three to four years of the foreseeable future, so that all dollars paid to the claimants herein in effect will be represented by dollars contributed to the fund by United States Steel Corporation as a result of increased rates. See Section 4141.25 of the Revised Code of Ohio. Whether United States Steel Corporation is or is not in a financial crisis is immaterial. The question more properly to be asked is "What is the interest of United States Steel Corporation?"

The interest of the employer in the unemployment compensation fund is recognized by Ohio law. The employer of a claimant is made an interested party by statute. It is given notice of the proceedings on a claim as the claim is processed by the agency, and it is given appeal rights. It is a necessary party to any proceedings in court which involve the claim. See Section 4141.01(I), 4141.28 and 4141.24 of the Revised Code of Ohio.

In *Carnegie-Illinois Steel Corporation v. Review Board,* 117 Ind. App. 379, 72 N.E. 2d 662 (1947), the Court, commenting on the same interest in a similar law, said, "Appellees contend that there can be no constitutional question involved for the reason that the appellant has no proprietary interest . . .", and in reply the Court said, ". . . an employer contributes to the fund and has such an interest in its disbursement, and as the appellees admit, may be financially affected thereby in the form of lower rates. This is clearly a sufficient proprietary interest to maintain this appeal." Carnegie-Illinois Steel Corporation is now a part of United States Steel Corporation.

It is clear, therefore, that the interest of United States Steel Corporation is significant and substantial and that the three-Judge panel below failed to recognize the proprietary interest of United States Steel Corporation by not allowing it to be heard on the merits.

Such failure is a violation of the Fifth Amendment which prevents the federal government from taking private property without due process of law.

2. Unemployment Benefits May Be Properly Denied to Claimants Involuntarily Unemployed in a Labor Dispute.

In *In re J. K. Abernathy,* 259 N.C. 190, 130 S.E. 2d 292, the Supreme Court of the United States denied certiorari in a case which is directly in point with the controversy here in the following respects:

> (a) The state labor dispute disqualification was identical to Ohio's statute here in issue in that it disqualified claimants not on strike who lost their employment because of a strike in another state by a union to which they did not belong. Section 96-14(4) of the General Statutes of North Carolina, 1963, and Section 4141.29(D)(1)(a) of the Revised Code of Ohio in effect prior to December 2, 1975.
>
> (b) The state labor dispute disqualification clearly disqualified individuals otherwise eligible and qualified who were *involuntarily* unemployed due to a labor dispute.
>
> (c) A lower court allowed benefits declaring the statute unconstitutional as "an unlawful discrimination against these claimants in violation of the rights guaranteed to them by the Statutes and Constitution of the United States . . . ." North Carolina Superior Court of Mecklenburg County.

The Supreme Court of North Carolina reversed the decision of the lower court, the Superior Court of Mecklenburg County. It directed much of its opinion to the purpose of unemployment compensation and its early history, both in England and in the United States, to show that the fundamental purpose of the labor dispute disqualification in the state laws is twofold: (1) to

maintain a state's neutrality in labor management relations and (2) to prevent severe drains upon the insurance fund. The court quoted with approval from the Nebraska Law Review, Vol. 37, No. 4, of June, 1958 as follows:

> "Because there had been no previous experience [in England] it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating *the primary purpose for* which *the fund* was created—*the payment of benefits when unemployment was due to 'fluctuations in trade.'*" [Underscoring supplied]

See *Hughes, Principles Underlying Labor Dispute Disqualification,* 1946.

After enactment of the Social Security Act of 1935 the Federal Social Security Administration suggested a type of labor dispute disqualification which allowed benefits to be paid to individuals who were not participating in and not directly interested in the dispute—to those who were involuntarily unemployed. See 1940 Edition of the *Manual of State Employment Security* Legislation, pp. 504, 505. This was, however, advice only. The Social Security Board was required to approve all state laws which conformed to the Social Security Act of 1935. Neither the Ohio nor the similar North Carolina labor dispute disqualification provision formed the basis for disapproval by the Federal Social Security Administration. In fact, prior to 1961, the North Carolina labor dispute disqualification was similar to that recommended by the federal people and was replaced by provisions less generous to claimants. See *In re Abernathy, supra.*

The advice of the Social Security Administration was not followed by all the states. Many states followed the lead of Wisconsin which had enacted the Wisconsin Employment Reserves Act of 1932 before enactment of the federal law. That Wisconsin Act disqualified in the following way:

> "An employee who left (. . . or lost) his employment with an employer because of a strike or other bona fide labor dispute is not eligible for benefits . . . for any week in which the strike or labor dispute is in active progress . . . ."

Employees who lost work regardless of fault, and regardless of their lack of interest in the labor dispute were disqualified in Wisconsin and in those states which patterned their strike disqualification after that of Wisconsin.

Some states borrowed labor dispute disqualification language from Wisconsin and at the same time borrowed some of the language of the Social Security Administration. It is impossible to classify all the state labor dispute disqualifications and say that any two are identical. They approach each other as do those of North Carolina and the Ohio law in question here.

When Congress enacted the Social Security Act of 1935 it set forth certain exemptions and classifications such as for employers of less than eight, agricultural labor and domestic service in a private home. Other conditions were designed to give assurance that the state unemployment compensation laws be one in substance as well as name. The nearest to a requirement that a state concern itself with labor disputes was the provision that a state not deny compensation for an individual's refusal to accept new work: "(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute." Section 903, Social Security Act, 42 U.S.C.A. Chap. 7 (Supp.)

These conditions of the Social Security Act were attacked as being an unlawful invasion of the reserved powers of the states in *Charles C. Steward Mach. Co. v. Davis,* 301 U.S. 548, 81 L.Ed. 1279. The Court said at pp. 584-595:

> "The classifications and exemptions directed by the statute now in controversy have support in consideration of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them."

In *Grinnell Corp. v. Hackett,* 475 F.2d 449, the Circuit Court of the First Circuit has explored the Congressional intent in labor dispute situations and found (at 457) that "unambiguous Congressional intent is lacking".

Therefore, we have no federal preemption on the question of whether benefits must be paid or denied to otherwise eligible and qualified claimants who lose or leave their work because of a labor dispute. The states have been left free to enact such labor dispute disqualification provisions as they have considered would maintain the neutrality of the state and prevent substantial drains on their respective funds.

Under the Ohio law as amended, effective December 2, 1975, allowing for the payment of benefits to cer-

tain claimants not participating in and not interested in the labor dispute, it is clear that in a factory where members of several unions are employed and one union of four boilerhouse workers, for example, shuts down the entire plant, those members of the other unions who lose their work are disqualified. Although the opinion speaks approvingly of a new law, the principles of the *Hodory* decision would invalidate the present Ohio labor dispute disqualification because it denies benefits to some who are involuntarily unemployed. It would appear from Footnote 5 that the three-Judge panel was unaware that individuals involuntarily unemployed would be denied benefits under Ohio's labor dispute provision as amended effective December 2, 1975.

The argument which the three-Judge panel uses to grant benefits is that in a strike situation if the employee loses work without fault he should receive benefits. This argument disregards the fact that the employer also is without fault. Why should the employer be forced to pay?

The thrust of the reasoning in the opinion of the three-Judge panel is that the claimants in a labor dispute situation are entitled to benefits if they can show that they are unemployed without "some fault of their own" as is specified in the voluntary leaving, refusal to work and other disqualifications. See pp. 8 and 9 of the Opinion. If such

> "contention finally prevails, there will be, in effect, no labor dispute disqualification at all since all determinations in such situations can be made under other clauses without reference to the labor dispute provision." *Hughes, Principles Underlying Labor Dispute Disqualification,* p. 5.

If the fault of the claimant becomes a proper subject for inquiry by the state in a labor dispute situation, then the state will be abandoning its neutrality in labor disputes.

Obviously, the strike disqualification provisions were adopted for a purpose, namely, to protect the funds to some degree from inordinate drains in labor dispute situations and to maintain the neutrality of the states in such situations.

The three-Judge panel below emphasized the word "involuntary" in the language of Section 4141.29 of the Ohio Revised Code. See p. 8 of the Opinion. We need only to point out that the word "involuntary" must be read in context with the rest of the sentence in which it is found. The sentence cited in Section 4141.29 of the Ohio Revised Code reads as follows:

> "Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in amounts *and subject to the conditions stipulated in Sections 4141.01 to 4141.46 of the Revised Code.*" [Underscoring supplied]

It should be clear, therefore, that being unemployed involuntarily is not the only test for the payment of benefits to those otherwise eligible and qualified. There are instances where other considerations become controlling as when a state decides what it must do in order to protect its fund or to maintain its neutrality in the case of the first labor dispute situation.

Ohio has done a commendable job in maintaining a solvent position for its fund. Many states with generous labor dispute disqualification provisions which pay claimants involuntarily unemployed have been

forced to borrow from the federal government. The total of such borrowings as of April 15, 1976 was $3,077.2 billion. Four additional states are expected to borrow in the first quarter of 1977. The estimated total of outstanding loans as of December 31, 1977 is projected at $6.4 billion according to the United States Department of Labor, Employment and Training Administration, Unemployment Insurance Service, Branch of State Tax Accounting.

We cite again the decision of the Supreme Court of North Carolina in the case of *In re J. K. Abernathy, supra*. The opinion of that Court concludes as follows:

> "The cases here discussed, and many more therein cited would seem sufficient to convince all but the highly skeptical that in passing the 1961 amendment the North Carolina General Assembly acted within its constitutional powers. 'When the subject lies within the police power of the state, debateable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment and its action within its range of discretion cannot be set aside because compliance is burdensome.' " *Sproles v. Binford,* 286 U.S. 374, 52 S. Ct. 581, 761 Ed. 1167.
>
> * * *
>
> "Legislative bodies may distinguish, select, and classify objects of legislation .... They may prescribe different regulations for different classes. . . . The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. . . . The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualification contained in the 1961 amendment involves a question of degree and not of principle."

CONCLUSION

United States Steel Corporation submits that its interest in these proceedings is significant and substantial, that it has a proprietary interest in the final decision and that failure to have made it a party violates the due process clause of the Fifth Amendment.

The decision of the three-Judge panel below, in its interpretation of the purpose of the unemployment compensation laws and the authority of the Ohio legislature to enact a strike disqualification law less generous than some other states, erred and it must be reversed.

For the foregoing reasons we urge the Court to take jurisdiction in this case.

Respectfully submitted,

.....

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75-1707

Supreme Court, U. S.
FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. .....

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,

Appellants,

v.

LEONARD PAUL HODORY,

Appellee

MOTION FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT OF THE MOTION

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Motion to Intervene

AND NOW comes the United States Steel Corporation by its attorney, Frank Manak, and moves this Court pursuant to Rules 24(a)(2) and 24(b)(2) of the Rules of Civil Procedure to intervene in the above-captioned action solely for purposes of participating in an appeal of the above action to the United States Supreme Court.

Respectfully submitted,

FRANK MANAK

Attorney for U. S. Steel Corporation

BRIEF IN SUPPORT OF MOTION TO INTERVENE

On March 4, 1976, a three judge court in the Northern District of Ohio found that the application of the Ohio labor dispute qualification provision, §4141.29 (d) (1) (a) of the Ohio Revised Code, was constitutionally invalid as to the appellee and the class members on equal protection and due process grounds. The Ohio Bureau of Employment Services, the appellant before this Court, was enjoined from continuing to enforce the provision against the appellee and the class members.

The appellant had filed a notice to appeal to this Court on March 26, 1976. On April 21, 1976, before the three judge court, U. S. Steel filed a motion to intervene in this case solely for the purpose of participating in the appeal taken by the Ohio Bureau of Employment Services. The three judge court dismissed this motion, holding that the filing of a notice of appeal divested the three judge court of jurisdiction in this case and refused to consider the merits of the motion to intervene filed by U. S. Steel. In order to expedite the final resolution of the issues in this case, the court found it appropriate to reach the merits, in case the court would ever be deemed to have jurisdiction to consider the motion. The court, in that event, would have denied the motion. See Appendix.

U. S. Steel is not here to appeal the District Court's dismissal of the prior motion, but rather, is here to file a new motion to intervene in this case for the purpose of participating in the above-captioned appeal before this Court. In support of this motion, U. S. Steel invokes the principles of Rules 24(a) (2) and 24(b) of the Federal Rules of Civil Procedure. These rules, of course, only

directly apply to the prescribed procedure in the district courts but it is submitted that the above portions of Rule 24 ought to apply by analogy on this motion to intervene for the purpose of participating in the appeal before this Court. It is the position of United States Steel Corporation that it is entitled to intervene in this action under the provisions of Rule 24(a)(2) of the Rules of Civil Procedure which permits intervention.

> (2) When the applicant claims interest to the property or transaction which is the subject of the action and he is so situated that the disposition of the action and may, as a practical matter, appear or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

It is clear that United States Steel Corporation has a financial interest in the outcome of this litgation. As set forth in the affidavit of John Re under the Employment Compensation Law of Ohio, the amount of unemployment compensation tax paid by an employer depends on the amount of unemployment compensation benefits paid to his employees. See Appendix. Accordingly, each employer has a definite interest in insuring that his employees collect no more in unemployment compensation than that which they are entitled to receive. Obviously, United States Steel has a significant interest in the outcome of the instant case because of the great number of U. S. Steel employees who would receive the unemployment compensation benefits as a result of the Court's decision in this case.

It is also clear that the disposition of the instant action as a practical matter would not only impair the ability of U. S. Steel to protect this interest but would

actually demolish such ability. Ordinarily, an employer aggrieved by the act of the Bureau of Employment Services in awarding unemployment compensation to claimants may protest such action through the administrative processes established by the Ohio Unemployment Compensation Law and may then seek judicial review of the decision reached by such process. Although U. S. Steel could, of course, protest any action of the Bureau of Employment Services in paying unemployment compensation to the members of the class (in accordance with the order of the three judge court) such an appeal would, obviously, be fruitless because both the Ohio administrative authorities and the Ohio courts would be bound by this Court's decision regarding the constitutionality of the Ohio labor dispute qualification and, accordingly, would have no choice but to deny U. S. Steel's protest. Thus, U. S. Steel has no avenue to protect its interest than through intervention in the present case.

Appellee would argue that the interest of the Ohio Bureau of Unemployment Services are essentially the same as the interests of U. S. Steel in this case and that the interest of U. S. Steel would be adequately represented in this case by the Bureau. On U. S. Steel's prior motion to intervene, the District Court, without discussion, concluded that the interests of the Bureau were essentially the same as the interests of U. S. Steel. It taxes credulity to assume that these interests are essentially the same. It is the position of U. S. Steel that its interests are not adequately represented by the appellants in the instant case. The interests of the appellants in this case are to see that the laws of the State of Ohio are enforced in accordance with the intention of the

legislature and the governor. The appellants have no particular interest whether or not the plaintiffs get unemployment compensation or not. Indeed, since the labor dispute provision at issue in this case has been appealed, the appellants' major interest in this litigation involves the potential impact of the principles of this decision on the current labor dispute disqualification. On the other hand, U. S. Steel, as noted above, will certainly have a direct financial interest in the immediate consequences of this decision. Given the difference in interests between the defendants and U. S. Steel, the appellants cannot, by definition, adequately represent the interests of U. S. Steel. Indeed, the Supreme Court's decision in *Trbovich v. United Mine Workers,* 404 US 528, 538-9, (1972), has established the principle that a governmental agency cannot adequately represent the interests of a private party because a governmental agency has, at best, a dual function since it must also represent the public interest and enforce the law in accordance with the intent of Congress as well as champion the cause of the private party it allegedly represents. The Court noted that "both functions are important and they may not always dictate precisely the same approach that the conduct of litigation. Even if the Secretary is performing his duties broadly conceived the union member may have a valid complaint about the performance of his lawyers." (at 539). *Trbovich* then stands for the principle that the inadequacy principle should not bar intervention by a private party such as U. S. Steel in a suit where a governmental agency is allegedly representing the private party's interest let alone in a case such as this where the governmental agency is not charged with protecting the interests of U. S. Steel but, by coincidence, is on the same general side as U. S. Steel.

Also, it is clear that under the circumstances of this case, the instant motion to intervene is timely made. U. S. Steel, as set forth in the affidavit by John Re, had no knowledge of the existence of this litigation until the District Court's decision was reported in various newspaper accounts. Indeed, U. S. Steel did not even receive a copy of the U. S. District Court's decision, let alone the remaining pleadings, until March 18, 1976. Under these circumstances, it motion to intervene at this time solely for the sake of participating in an appeal is timely. As Professor Moore has noted, "intervention after judgment is unusual and not often granted. It may be allowed, where it is the only way to protect the intervenors, e.g. where the intervenor would be bound by the judgment and the party purporting to represent him fails to appeal." 3. B. Moore's Federal Practice, 24-5, 26-7. Accord, *American Brake Shoes & Foundry Company v. Interborough Rapid Transit Company,* 3 F.R.D. 162 (S.D.N.Y. 1942).

In the alternative, it is the position of U. S. Steel that Rule 24(b)(2) of the Federal Rules of Civil Procedure may be properly invoked here.

> "Upon timely application, anyone may be permitted to intervene in an action: . . . subsection 2 when applicant's claim or defense and the main action have a claim of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

It is difficult to see how the proposed intervention will unduly delay or prejudice the adjudication of the rights of the original parties. The litigation now involves

a purely appellate matter and U. S. Steel's intervention will not significantly prolong the proceeding, will not significantly increase the workload of the Court, will not affect the rights of the parties, and ought not hamper the proper presentation of their respective cases. Accordingly, this Court should grant U. S. Steel's motion to intervene solely for the purpose of participating in an appeal.

Respectfully submitted,

FRANK MANAK
Attorney for U. S. Steel Corporation

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

No. C 75-15 Y

Affidavit

Commonwealth of Pennsylvania
County of Allegheny } ss.:

Before me, the undersigned public authority, personally appeared John Re who being duly sworn in accordance with law deposes and says:

1. I am John Re, Staff Assistant—Tax Division, United States Steel Corporation.

2. I have responsibility for the overall handling of unemployment compensation matters within the United States Steel Corporation.

3. In 1974, a large number of United States Steel Corporation employees at the Youngstown, Lorain and Cuyahoga Works facilities were laid off as a result of a coke shortage which in turn was caused by a strike by the United Mine Workers of America at the Corporation's mines.

4. Many of the employees so laid off applied for unemployment compensation under the Ohio Unemployment Compensation Law.

5. The Ohio Bureau of Employment Services denied claims for unemployment compensation by employees from Youngstown and Cuyahoga Works because of the labor dispute disqualification in the Ohio Unemployment Compensation Law but awarded unemployment compensation to many employees from Lorain Works.

6. The United States Steel Corporation has appealed the award of unemployment compensation to employees from Lorain Works.

7. The United States Steel Corporation is not a party to the above action and had no knowledge of its existence until newspaper accounts concerning this court's decision in this case were called to its attention.

8. The United States Steel Corporation did not receive a copy of the decision in this action until March 18, 1976.

9. Since under the unemployment compensation law an employer's tax rates reflects the number of benefits paid to his employees so that ultimately an employer pays one dollar in taxes for every dollar of benefits which his employees receive, the United States Steel Corporation has a definite financial interest in this action and any litigation involving claims for unemployment compensation.

10. Representatives of the defendant have advised me that their appeal of the instant action is motivated more by their concern about the prospective impact of the court's reasoning than their concern about the deci-

sion in the instant case and its impact on the United States Steel Corporation's experience rating under the Ohio Unemployment Compensation Law.

.....

JOHN RE (SEAL)

Sworn to and subscribed before me this 20th of April, 1976.

JANET A. POLHAMUS
Notary Public
Pittsburgh, Allegheny County
My Commission Expires September 4, 1978

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

No. C 75-15 Y

Order

On April 21, 1976 United States Steel filed a motion in which it sought to intervene (presumably as a defendant) for purposes of participating in the appeal of this case, relying in support of its motion on Rule 24(a)(2), Federal Rules of Civil Procedure. United States Steel is the employer of the plaintiff class in this case and it contends that intervention of right must be allowed due to the financial consequences to it resulting from judgment entered in this case on March 5, 1976.

It appears that since a notice of appeal was entered in this case on March 26, 1976, this Court no longer has jurisdiction over these proceedings and that consideration cannot be given to the merits of the motion by United States Steel. *Rolle v. New York City Housing Authority,* 294 F.Supp. 574, 576 (S.D.N.Y. 1969). The prevailing rule is that the filing of a notice of appeal divests the trial court of jurisdiction over that case. *Elgen Manufacturing Corp. v. Ventfabrics, Inc.,* 314 F.2d

440, 444 (7th Cir. 1963) and *Weiss v. Hunna,* 312 F.2d 711, 713 (2nd Cir. 1963), *cert. denied* 374 U.S. 853 (1965), *reh. denied* 375 U.S. 874 (1963). Although none of the above cases involved decisions of three-judge courts, there is no reason to suppose the general rule would not be applicable to this type of proceeding. Accordingly, the motion must be dismissed since the Court lacks jurisdiction to consider it.

It is appropriate, however, to deal with the merits of the motion by United States Steel so as to expedite final resolution of the issues in this case, should this Court be deemed to have jurisdiction to consider the request for intervention.

Turning to the motion, it is noted that although intervention of right under Rule 24(a), F.R.C.P., is non-discretionary once the requirements established in that provision are met, the trial court must determine that the motion meets these requirements, including the fact that the motion is timely. *N.A.A.C.P. v. State of New York,* 413 U.S. 345, 365 (1973). In making an assessment of the timeliness of a motion to intervene, the trial court should consider, among other things, how far the proceedings have gone, what prejudice to the existing parties would arise from the allowance of the motion and what factors caused the delay in the filing of the motion *Nevilles v. E.E.O.C.,* 511 F.2d 303, 305 (8th Cir. (1975).

In this case, the Court finds the following matters relevant. The complaint was filed on January 27, 1975. Several pre-trial conferences were held and the matter was not presented until some nine months later and judgment was not entered until March 5, 1976. During these proceedings, numerous reports were made by the

mass media on the status of this case. At the time judgment was entered, a considerable amount of publicity accompanied the decision. Yet it was not until seven weeks after the entry of judgment that United States Steel filed its motion. Moreover, all relevant issues were fully treated by the parties and there was a totally adversary presentation of their views. The present defendants have a considerable interest in the outcome of the appeal and their interests are essentially the same as that of United States Steel.

Considering all of these factors, the Court finds that the matters raised are inadequate to support the rather exceptional relief requested by United States Steel, and accordingly its Motion to Intervene is denied.[2]

IT IS SO ORDERED.

.....

ANTHONY J. CELEBREZZE
Circuit Judge

.....

THOMAS D. LAMBROS
District Judge

.....

ROBERT B. KRUPANSKY
District Judge

Dated: .....

---

2. As has been noted by the Court of Appeals for the Sixth Circuit in an analogous situation, participation as *amicus curiae* might be appropriate. See *Brewer v. Republic Steel Corporation,* 513 F.2d 1222 (6th Cir. 1975). This question is clearly one for the Supreme Court, however.

MOTION FILED
SEP 2 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,

Appellants

vs.

LEONARD PAUL HODORY,

Appellee

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT OF THE MOTION

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,

Appellants

vs.

LEONARD PAUL HODORY,

Appellee

MOTION TO INTERVENE

NOW COMES Republic Steel Corporation by its attorney, Walter J. Mackey, and moves this Court for leave to intervene in the above-captioned action for the purpose of participating in the appeal of the above action on the ground that it has an interest in appellee's right to unemployment benefits which it otherwise may not be able to protect.

Respectfully submitted,

WALTER J. MACKEY
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614-486-1655
Attorney for
Republic Steel Corporation

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,

Appellants

vs.

LEONARD PAUL HODORY,

Appellee

BRIEF IN SUPPORT OF MOTION TO INTERVENE

We submit that Republic Steel Corporation is entitled to intervene in this action for the following reasons:

1. REPUBLIC STEEL CORPORATION HAS A SUBSTANTIAL AND DIRECT ECONOMIC INTEREST IN THIS ACTION.

The system of "experience rating" under the Ohio Unemployment Compensation law has been described in some detail in the Jurisdictional Statement of the Attorney General on behalf of the Ohio Bureau of Employment Services and in other pleadings in this case.

The plan of charging an employer's account with benefits paid to his employees and crediting his account with contributions to arrive at his contribution (tax) rate has been explained.

Briefly stated, an employer's payments into the State Trust Fund are measured and controlled by the amount of unemployment benefits paid to his employees. Although referred to as "contributions" in the law, the courts have generally characterized these payments as payroll excise taxes.

Although the exact amount of charges to Republic Steel's accounts resulting from the lower court's decision is not shown in the record of this case, the economic impact resulting from increased taxes on its payroll would be substantial. (See Affidavit of Jack R. Vanek — Appendix A)

2. REPUBLIC STEEL CORPORATION HAS BEEN DENIED DUE PROCESS IN THE COURT BELOW.

Republic Steel is an interested party in the cases that are pending with the Board of Review of the Ohio Bureau of Employment Services.

The decision of the Three Judge District Court interrupted the orderly processing of these appeals in the state courts and by failing to make Republic a party denied it an opportunity to appear and present evidence, a denial of procedural due process.

The Appellee invoked the jurisdiction of the federal court below to accomplish the same purpose as in the state administration and judicial process, to wit — the right to unemployment benefits. Republic Steel has the same economic and legal interest in this court in opposing these claims for unemployment benefits.

3. A MOTION TO INTERVENE IN THE FEDERAL DISTRICT COURT WAS DENIED.

On March 5, 1976, the Three Judge District Court issued a Memorandum Opinion enjoining the Ohio Bureau of Employment Services from denying unemployment benefits to a large number of employees of Republic Steel who had been denied benefits on the ground that their unemployment was due to a labor dispute as provided in Sec. 4141.29(D)(1)(a).

Republic Steel Corporation was not notified of this action in the lower court and did not receive a copy of the decision by the court until sometime late in March, 1976.

A Motion for Leave to Intervene was filed in the District Court under Rule 24(a)(2) of the Rules of Civil Procedure which leave was denied.

In denying a similar motion to intervene by United States Steel Corporation the lower court stated,

> "The present defendants (Ohio Bureau of Employment Services) have a considerable interest in the outcome of the appeal and their interests are essentially the same as that of the United States Steel."

(Parenthetical material supplied) (See Appendix B)

As discussed below we believe the District Court was in error in equating the interests of the steel companies with that of the state agency administering the law.

4. REPUBLIC STEEL CORPORATION'S INTERESTS IN THIS CASE CANNOT BE ADEQUATELY REPRESENTED BY THE STATE AGENCY WHICH ADMINISTERS THE LAW.

In the first place the Bureau of Employment Services has no financial interest in the outcome of this action.

On the other hand, it is clear that the charges to Republic's account resulting from the allowance of these claims for unemployment benefits will have an adverse effect on its experience rating causing an increase in its payroll taxes for unemployment compensation.

While the administrator has the duty of protecting the Trust Fund from unwarranted payment of benefits, his primary responsibility is the impartial administration of the law without taking the side of either the employer or the claimant in controversial cases.

The principle that a governmental agency cannot represent the interest of a private party has been expressed in the case of *Trbovich vs. United Mine Workers*, 404 U.S. 528, 538-9 (1972). The reasoning is sound and recognizes the fact that in a case such as this the governmental agency has the dual function of representing the public interest in enforcing the law and also championing the cause of the private party which may not dictate precisely the same approach in the conduct of litigation. Only by coincidence is the Bureau on the same side as Republic Steel in this action.

5. THE PRINCIPLES ADOPTED IN RULE 24(a)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE INVOKED IN ALLOWING THIS MOTION TO INTERVENE.

We realize that these Rules of Civil Procedure apply directly to procedure in the lower federal courts. However, the situation of Republic Steel Corporation in this case falls squarely within the scope of Rule 24(a)(2) which permits intervention:

> "(2) Where the applicant claims an interest re-

> lating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

We have demonstrated that Republic Steel Corporation has a direct financial interest in the property which is the subject of this action; that the disposition of this action without Republic's participation would destroy its ability to protect such interest; that the Ohio Bureau of Employment Services does not and cannot be expected to adequately represent the interest of Republic Steel in this case; and that Republic's Motion to Intervene in the lower court was denied.

For the above reasons we submit that this Court should exercise its discretion and allow Republic Steel Corporation's Motion to Intervene for the purpose of participating in the appeal of this action to the United States Supreme Court.

Respectfully submitted,

WALTER J. MACKEY
1480 West Lane Avenue
Columbus, Ohio 43221
614-486-1655
Attorney for
Republic Steel Corporation

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 75-15 Y

LEONARD PAUL HODORY,
Plaintiff

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

AFFIDAVIT

BEFORE ME, a Notary Public, in and for said County personally appeared Jack R. Vanek, who being duly sworn, deposes and says:

1. I am Jack R. Vanek, Manager, Payroll and Employee Benefits Accounting, Republic Steel Corporation.

2. I have responsibility for the overall handling of unemployment compensation matters within Republic Steel Corporation.

3. In 1974, a large number of Republic Steel Corporation employees lost their employment with Republic at its Warren, Youngstown and Cleveland plants as a result of a coal shortage caused by a strike by the United Mine Workers of America at the Corporation's coal mines.

4. Many of the employees who became so unemployed applied for unemployment benefits under the Ohio Unemployment Compensation Law.

5. The Ohio Bureau of Employment Services denied most of the claims for unemployment benefits by the employees at the Warren plant because of the labor dispute disqualification provisions in the Ohio Unemployment Compensation Law but allowed benefits to most of the employees at the Cleveland and Youngstown plants.

6. Republic Steel Corporation was not made a party to the above action and had no knowledge of its existence until newspaper accounts concerning this court's decision appeared in the local papers.

7. Republic Steel Corporation did not receive a copy of the decision in this action until sometime in early March, 1976.

8. Under the Ohio Unemployment Compensation Law an employer's unemployment tax rate is controlled by the amount of benefits paid to his employees.

9. The merit rating provisions of the law are designed so that an employer pays into the trust fund approximately the amount paid out to his employees in the form of unemployment benefits. Republic Steel Corporation, therefore, has a very definite and direct financial interest in this action as it applies to pending claims before the state administrative agency and to future claims which invoke the labor dispute disqualification provisions of the Ohio Unemployment Compensation Law.

JACK R. VANEK

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 75-15Y

LEONARD PAUL HODORY,
Plaintiff

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendant

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

ORDER

Republic Steel Corporation has moved this Court, pursuant to Rule 24(a)(2), Federal Rule of Civil Procedure to intervene as a defendant in the appeal of the above styled case. Republic Steel contends that intervention of right must be allowed due to the financial interest it has in the disposition of this action.

On April 21, 1976 United States Steel filed a motion to intervene with this Court similar to that of Republic Steel. United States Steel also asserted that intervention of right must be allowed due to the financial consequences to it resulting from judgment entered in this case on March 5, 1976.

By its order of May 26, 1976 the Court dismissed the above motion of United States Steel for lack of jurisdiction. The Court further found that in the event

it should be deemed to have jurisdiction to entertain the motion of United States Steel, that such motion must be denied on the merits as it was not filed in a timely fashion.

The Court finds its prior order of May 26, 1976 and the findings set forth therein regarding the jurisdiction of this Court and the merits of the motion of United States Steel, to be dispositive of the motion to intervene of Republic Steel. Accordingly, the motion to intervene of Republic Steel is denied.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge
THOMAS D. LAMBROS
United States District Judge
ROBERT B. KRUPANSKY
United States District Judge

DATED: 6-4-76

Supreme Court, U. S.,
FILED
NOV 30 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

ALBERT G. GILES,

Appellants,

VS.

LEONARD PAUL HODORY,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Jurisdictional Statement Filed May 25, 1976

Probable Jurisdiction Noted October 4, 1976.

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September 24, 1975	—Answer to Requests for Admission
October 10, 1975	—District Court Brief of Plaintiff
October 20, 1975	—District Court Brief of Defendant
March 4, 1976	—Opinion and Order of Three Judge District Court.

Ohio Bureau of Employment Services

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address: Leonard P. Hodory, 1810 Paisley St., Apt #24, Youngstown, Oh. 44515

2. Employer's Name and Address: United States Steel Corp., Youngstown District, Attn: A. Johnston, 1509 Muriel St., Pittsburgh, P.A. 15203

3. Date Mailed 1-3-75

4. Social Security Account Number 289 42 5007

5. Benefit Year Began 11-10-74

6. Local Office Number 809-1

7. THIS NOTICE IS A DETERMINATION OF:
- [X] (a) First Weekly Claim
- [ ] (b) Additional (Reopened) Weekly Claim
- [ ] (c) Continued Weekly Claim
- [ ] (d) Other—See Decision Below

8. ISSUE(S): LABOR DISPUTE 11-5-75

APPLICABLE LAW: . . .
Section 414.29(D)(1)(a) Ohio Law

A labor disupte started at coal mines owned and operated by U.S. Steel Corporation and claimant is unemployed because of this labor dispute. The law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute.

Accordingly claim for week ending 11-16-74 is hereby disallowed.

Week ending 11-16-74 is further disallowed as claimant had earnings in excess of his weekly benefit amount.

Exhibit "2"

Ohio Bureau of Employment Services

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision in item 8.

1. Claimant's Name and Address: Leonard P. Hodory, 1810 Paisley St. Apt. 24, Youngstown, Ohio 445[illegible]5

2. Employer's Name and Address:

3. Date Mailed 1-23-75

4. Social Security Account Number 289-42-5007

5. Benefit Year Began 11-10-74

6. Local Office Number 809-1

7. THIS NOTICE IS A DETERMINATION OF:
- ☐ (a) First Weekly Claim
- ☐ (b) Additional (Reopened) Weekly Claim
- ☒ (c) Continued Weekly Claim
- ☐ (d) Other—See Decision Below

8. ISSUE(S): LABOR DISPUTE 11-15-74 - 1-11-75 APPLICABLE LAW: . . . Sec. 4141.29(D)(1)(a) Ohio Law

During the period between 11-15-74 and 1-11-75 a labor dispute existed at coal mines owned and operated by United States Steel. This dispute caused a curtailment of operations at the United States Steel plant in Youngstown, Ohio, where claimant was employed. As a result of such curtailment, claimant was separated from his employment with United States Steel.

Section 4141.29 (D)(1)(a) Ohio law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute that exists anywhere at an establishment owned and operated by his employer. Accordingly, claims for unemployment benefits for the following weeks are hereby disallowed.

Week Ending 11-23-74	Week Ending 12-21-74
Week Ending 11-30-74	Week Ending 12-28-74
Week Ending 12-07-74	Week Ending 01-07-75
Week Ending 12-14-74	Week Ending 01-11-75

Ohio Bureau of Employment Services

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address: O. C. Webster, 111 Columbia St., Youngstown, Ohio 44510

2. Employer's Name and Address: Republic Steel Corp. Plt. 40

3. Date Mailed 1-27-75

4. Social Security Account Number 426-30-1364

5. Benefit Year Began 12-29-74

6. Local Office Number 869-0

7. THIS NOTICE IS A DETERMINATION OF:
- ☐ (a) First Weekly Claim
- ☐ (b) Additional (Reopened) Weekly Claim
- ☒ (c) Continued Weekly Claim
- ☐ (d) Other—See Decision Below

8. ISSUE(S): LABOR DISPUTE 11-17-74 - 1-11-75 APPLICABLE LAW: . . . Sec. 4141.29(D)(1)(a) Ohio Law

From 11-17-74 through 1-11-75 claimant was unemployed due to a labor dispute at coal mines owned and operated by Republic Steel Corp. The law provided that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute. Accordingly, claim for week ending 1-11-75 is hereby disallowed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,

Plaintiff,

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, ET AL.,

Defendants,

Filed Mar. 5 9:13 AM '76
No. C 75-15 Y

MEMORANDUM OPINION AND ORDER

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

Plaintiff, Leonard Paul Hodory (Hodory) filed the above-mentioned action, pursuant to 42 U.S.C. § 1983, on behalf of himself and all other persons similarly situated whose claims for unemployment benefits were denied or will be denied because of the operative effective of a labor dispute disqualification provision in § 4141.29(D)(1)(a) of the Ohio Revised Code.

Hodory challenged the constitutionality of § 4141.29(D)-(1)(a) on grounds that: the provision is in conflict with § 303(a)(1) of the Federal Society Security Act, 42 U.S.C. § 503(a)(1) and violates the Supremacy Clause to the United States Constitution; the labor dispute disqualification contained therein denies plaintiff and the class he seeks to represent the right to equal protection of the laws, guaranteed under the 14th Amendment to the United States Constitution; and the over-broad disqualification provision bears no real and substantial relation to the legislative purpose and constitutes a denial of due process of law guaranteed by the 14th Amendment to the United States Constitution.

Hodory requested the issuance of permanent injunctive relief to restrain the Ohio Bureau of Employment Services (Employment Bureau) and the Administrator, Albert E. Giles, from enforcing § 4141.29(D)(1)(a) and a declaration that the statute is unconstitutional. In addition, plaintiff sought past unemployment benefits for himself and the class he purports to represent which he alleged were denied by virtue of the application of that statutory provision.

This matter came on for hearing before this three-judge Court on October 23, 1975. The following are the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The operative facts as set forth herein were not disputed by the parties.

Hodory was laid off from his job as a Millwright apprentice with the United States Steel Corporation (U.S. Steel), Ohio Works, in Youngstown, Ohio on November 12, 1974. He applied for unemployment benefits on November 13, 1974 and was subsequently notified by the Ohio Bureau of Employment Services (Employment Bureau) that his claim was disallowed, pursuant to § 4141.29(D)(1)(a) O.R.C.

Section 4141.29(D)(1)(A) provides, in pertinent part:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) for any week with respect to which the administrator finds that:
>
> (a) **His unemployment was due to a labor dispute** other than a lockout **at any factory, establishment, or other premises** located in this or any other state and **owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute . . .** Emphasis added.)

It is clear that Hodory became unemployed through no fault of his own. He was one of approximately 1,250 United Steelworkers who was laid off by either U.S. Steel or Republic Steel Corporation at their plants in Ohio because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two steel companies. The steelworkers were in no way involved in the disqualifying labor dispute between the coal miners and the steel companies nor did they benefit from that dispute.

Hodory was denied unemployment benefits from November of 1974 through January 11, 1975, at which time the coal miners' strike was apparently terminated. The Employment Bureau's sole basis for denying Hodory's application for weekly benefits during this period was that such benefits were barred under the labor dispute disqualification found in § 4141.29-(D)(1)(a) O.R.C.

Hodory has taken an administrative appeal from the decision of the Employment Bureau, which appeal is still pending. It is being considered along with the appeals of the approximately 1,250 other claimants similarly situated as a "group appeal" by the administrative Board of Review.

Hodory resumed his employment on March 30, 1975 and is presently employed.

During the pendency of this lawsuit § 4141.29(D)(1)(a) O.R.C. was amended to provide, in pertinent part, that:

> . . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . .

This amendment, Am. Sub. Senate Bill 173, however did not become effective until December 2, 1975, and is not to be retroactively applied.

II. CONCLUSIONS OF LAW

A. Availability of Relief in this Court

The first issue for this Court to consider is whether, in light of the pendency of the appellate administrative proceedings, this Court is precluded from adjudicating plaintiff's claims and from issuing injunctive relief against the defendants should the Court conclude that plaintiff is entitled to such relief on the merits of his claims.

Initially, it should be noted that there is no absolute bar in this case against the issuance of injunctive relief under the provisions of 28 U.S.C. § 2283, the Anti-injunction statute. *Mitchum* v. *Foster*, 407 U.S. 225 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). The Court must, nevertheless, consider the possible applicability of certain established principles of equity, comity, and federalism which would require this Court to refrain from determining the claims for injunctive relief.

The Supreme Court has recently articulated those circumstances in which such principles may suggest that a federal court refrain from exercising jurisdiction or abstain from determining claims for injunctive relief: 1) where a party has failed to exhaust available administrative remedies; 2) where a party seeks to enjoin a pending state criminal prosecution in the absence of special circumstances as set forth in *Younger* v. *Harris*, 401 U.S. 37 (1971); or where abstention and a stay in federal court is indicated to afford the state courts an opportunity to determine unsettled questions of state law prior to federal court intervention on the federal constitutional questions. *Gibson* v. *Berryhill, supra*, 411 U.S. at 573-574.

Upon due consideration, the Court concludes that the circumstances of the present case do not present a situation where dismissal or abstention would be appropriate. While

clearly the plaintiff herein has not exhausted the administrative remedies which are available under Ohio law, in *Gibson*, the Supreme Court stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U.S.C. § 1983. Moreover, in the instant action, exhaustion of the available administrative remedies would in all probability prove a futile effort to vindicate plaintiff's constitutional claims in this case. Section 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits for the period he was laid off due to coal miners' strike. In addition, the Employment Bureau has denied benefits to plaintiff, as well as the 1,250 United Steelworkers, who were similarly effected by the coal miners' strike, solely on the basis of the challenged labor dispute disqualification.

It was established at the hearing that the administrative appeal process does not permit the plaintiff to challenge the constitutionality of § 4141.29(D)(1)(a). The agency is bound by the prior Ohio court determinations as to the effect of that provision, and the Ohio courts have held the disqualification provision to be constitutional.[1] The plaintiff's failure to exhaust

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[1] In an unpublished decision, the Court of Appeals of Montgomery County, Ohio, upheld the constitutionality of the provision. *Barnes* v. *Board of Review*, Case No. 3948, (1972). Moreover, the defendants cited to several Ohio Supreme Court cases in their brief and during oral argument in support of their position that § 4141.29(D)(1)(a) does not create an unconstitutional classification in violation of the Equal Protection clause of the 14th Amendment. *Cornell* v. *Bailey*, 163 Ohio St. 50 (1955); *Continental Can Company, Inc.* v. *Donahue*, 5 Ohio St. 2nd 224 (1966). In *Cornell* v. *Bailey*, the Supreme Court noted that it was the positive intent of the Ohio General Assembly to exclude those individuals who were involuntarily unemployed as well as those voluntarily unemployed as a result of a labor dispute from benefits. The Supreme Court concluded that such determination was a legislative function and that the only relief available to an involuntarily unemployed claimant was to seek a legislative amendment to the statute.

his administrative remedies therefore does not require a dismissal of his claims.

With regard to the Supreme Court's pronouncement in *Younger* v. *Harris, supra,* and the Court's subsequent decision in *Huffman* v. *Pursue,* 420 U.S. 592 (1975), the Court finds that the principles set forth in those cases do not necessitate that this Court exercise restraint in determining the issues raised herein or from issuing injunctive relief, should plaintiff be entitled to the same. While the *Huffman* decision broadens the judicially-created *Younger* doctrine to include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state courts, the Supreme Court in *Huffman* made it clear that its holding was limited to the enjoining of ongoing state-initiated *judicial* proceedings and that such prohibition did not extend to an action brought under 42 U.S.C. § 1983 in which a party was challenging state administrative action in federal court. *Supra,* n.21.

Finally, this Court concludes that abstention would not be proper in this case. Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law which could be rendered constitutionally inoffensive by a limiting construction in the state courts. *Daniels* v. *Waters,* F.2d (6th Cir. 1975). It has been held that "[A]bstention should not be applied merely to await an attempt to vindicate a claim of the appellant in state court." *Gay* v. *Board of Registration Commissioners,* 466 F.2d 879, 885 (6th Cir. 1972). In the instant case, plaintiff has not yet even reached the first level of judicial review and under § 4141.28 of the Ohio Revised Code, he is required to undertake three administrative appeals before he will be entitled to file his challenge in the state courts, where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled.

Accordingly, for the reasons set forth above, the Court concludes that the principles of comity, equity, and federalism do not require that this Court dismiss the instant suit or abstain

from deciding the claims presented herein until such time as the state courts may have an opportunity to adjudicate the same or from issuing whatever relief may be appropriate upon its determination.

B. Class Certification

Plaintiff, in his complaint, defined the class he purports to represent herein as all persons whose claims for unemployment benefits have been or will be denied because of the operative effect of § 4141.29(D)(1)(a). While the Court does find that class certification of the claims for injunctive and declaratory relief and past benefits is appropriate, the class as defined by plaintiff in his complaint is over broad in light of the nature of plaintiff's claims and the requirements of Rule 23 of the Federal Rules of Civil Procedures.

The plaintiff's factual allegations and the undisputed evidence presented herein established that Hodory and approximately 1,250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in § 4141.29(D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits.[2] With regard to this particular group of individuals, the Court finds that the prerequisites to certification of this action as a class action under Rule 23(a) have been met, and that the class action is maintainable under the provisions of Rule 23(b)(2).[3]

---

[2] At the hearing, plaintiff stated that the claims of some 6,100 Autoworkers in Youngstown, Ohio have been denied by defendants on the sole basis of the challenged disqualification provision. However, no further factual support was offered in this regard from which this Court can conclude that plaintiff's representation of these individuals in this suit would be proper under Rule 23.

[3] The fact that plaintiff seeks the award of past unemployment benefits does not effect the certification of this class as a Rule 23(b)(2) class. The monetary relief is essential in the nature of equitable

In light of the fact that the class is certified as a Rule 23(b)(2) class and the nature of the relief sought, the Court concludes that notice prior to the determination of the claims herein is not required.

C. Constitutional Validity of § 4141.29(D)(1)(a)

Plaintiff has challenged the constitutionality of § 4141.29(D)(1)(a) on several grounds. For the reasons set forth below, this Court concludes that the operative effect of that labor dispute disqualification provision violates the rights of plaintiff and the class he represents to equal protection and due process of law as guaranteed under the 14th Amendment to the United States Constitution and 42 U.S.C. § 1983.

Chapter 4141 of the Ohio Revised Code, which was enacted by the Ohio Legislative pursuant to the Federal Social Security Act, provides generally for the payment of benefits to unemployed individuals. In § 4141.29 it is indicated that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to **involuntary** total or partial unemployment. That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving such benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through some fault of their own.[4] Thus the provisions of § 4141.29(d)(1) reflect that an individual may not receive

relief rather than damages, and there is authority to support the maintainability of the class under 23(b)(2) in such circumstances. *Bermudez* v. *U.S. Department of Agriculture*, 490 F.2d 718 (D.C. Cir 1973); *see also, Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); 3B Moore's Federal Practice ¶23.40.

[4] The statute was previously held constitutional in the case of *Lasko* v. *Garnes*, No. C 72-1350 (N.D. Ohio, decided August 14, 1973), wherein the disallowance of benefits because of pregnancy was the basis of the challenge.

benefits if that person has been laid off for disciplinary reasons; or if the person quit work without just cause; or if the individual quit work to become married or because of marital, parental, filial or other domestic obligations, or become unemployed because of pregnancy; or if the person has made false statements in an attempt to obtain benefits; or if the person was discharged for dishonesty in connection with his most recent employment; or if the person has become unemployed as the result of a labor dispute. Therefore, the only class of unemployed individuals who are presently ineligible for benefits as a result of their having become unemployed involuntarily are those persons who fall within the labor dispute disqualification found in § 4141.29(D)(1)(a).[5]

A state legislature may create a classification which discriminates against certain individuals without violating the Equal Protection clause in the 14th Amendment, if that classification furthers a suitable governmental interest. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

In the instant action, the defendants argued in their brief that the legitimate reasons for the enactment of § 4141.29-(D)(1)(a) were that:

1. Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect be subsidizing the union members;

2. Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. If the financial burden of supporting its striking union members

[5] Of course, as of December 2, 1975 defendants will not be permitted to deny benefits to one unemployed due to a labor dispute unless an element of fault—"financing, participating in, or directly interested in"—demonstrated. However, the amendment does not moot the issues raised herein, since, as noted previously, it is not to be applied retroactively and will not effect the status of plaintiff and the class for the period during which they were denied benefits pursuant to § 4141.29(D)(1)(a).

is shifted from the unions' treasury to the State of Ohio, it's conceivable that no concerted effort to negotiate a fair settlement would be pursued until the employer reached a financial crisis, thereby yielding to unreasonable and economically unsound union demands to prevent bankruptcy;

3. The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U.S. Steel, Republic Steel . . . and other corporate giants involve many hundreds of employees, even thousands. Benefits paid to workers resulting from labor strikes lasting for many weeks or months would deplete the unemployment fund.

The Court concludes that defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. Each reason advanced contemplates that a union member, who is unemployed by virtue of a labor dispute between his employer and another union, has some control over, is at fault, or stands to benefit from that labor dispute. In fact, the evidence presented herein established that plaintiff and the class he represents were merely victims of the coal miners' strike, as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect his employer's financial ability to continue to employ him. The fact that the plaintiff and the 1,250 class members also happen to be union members (of a different union) is certainly no legitimate reason, standing alone, to deny them benefits. Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intending to prevent is not the "subsidizing" of unemployed **union members** per se, but the subsidizing of union-initiated work stoppages.

Certainly the three purposes offered by defendants would be legitimate reasons for the State's denial of benefits to unemployed members of a union which is involved in a labor

dispute. However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid the subsidization of the coal miners' strike. Nor is it logical to conclude that payments of unemployment benefits to the **Steelworkers** would have placed U.S. Steel or Republic Steel at an unfair disadvantage in negotiation with the **coal miners' union.** Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy.

The Court finds, therefore, that the defendants have failed to demonstrate that the classification imposed by § 4141.29-(D)(1)(a) is justified by a legitimate state interest under the circumstances of this case, and, accordingly, the Court concludes that the application of the labor dispute disqualification to deny benefits to plaintiff and the class certified herein is violative of the Equal Protection clause of the 14th Amendment and plaintiffs' rights as guaranteed by 42 U.S.C. § 1983.

Similarly, the Court finds that the defendants have failed to demonstrate that the application of § 4141.29(D)(1)(a) with respect to plaintiff and the class bears a real and substantial relation to a legitimate state purpose and, therefore, the statutory provision as applied in this case to deny individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer, also violates plaintiffs' right to due process of law guaranteed by the 14th Amendment and 42 U.S.C. § 1983.

Since the Court has declared the application of § 4141.29(D)(1)(a) to be constitutionally invalid as to plaintiff and the class members on equal protection and due process grounds, the Court need not reach the other issues raised by plaintiff in his complaint.

D. Relief

The Court finds that plaintiff and the members of the class of steelworkers, who were laid off for a specific period of time because of the labor dispute between their employer and the United Mine Workers and who, but for the labor dispute disqualification provision, § 4141.29(D)(1)(a), would have been entitled to collect unemployment benefits, are entitled to equitable relief in this case. Accordingly, the defendants, their agents and employees are enjoined from continuing to enforce § 4141.29(D)(1)(a) of the Ohio Revised Code so as to deny the unemployment benefits to plaintiff and the class members which they are entitled to receive. In this regard, the defendants shall pay those past unemployment benefits which would have been provided to each otherwise qualified claimant within this class to whom such benefits were denied on the sole basis of § 4141.29(D)(1)(a).

This case is hereby terminated.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: March 4, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, ET AL.,
Defendants.

Filed Mar. 9:13 AM '76
No. C 75-15 Y

JUDGMENT

CELEBREZEE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

In accordance with the accompanying Memorandum Opinion and Order, the defendants are enjoined from continuing to enforce Ohio Revised Code § 4141.29(D)(1)(a) so as to deny the plaintiff and the class members the unemployment benefits to which they are otherwise entitled, and defendants are further ordered to pay past unemployment benefits which were denied plaintiff and members of the class solely on the basis of § 4141.29(D)(1)(a). Plaintiffs shall recover their costs of suit.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: March 4, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff-Appellee,

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, ET AL.,
Defendants.

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

Filed Apr. 6 2:45 PM '76
No. C 15-15 Y

ORDER

Pursuant to Rule 62(c), Federal Rules of Civil Procedure and upon request of the defendants, the Court hereby suspends the injunctive relief granted in the Judgment entered in the above-styled case on March 5, 1976. The stay shall continue in effect until the conclusion of the appeal taken by defendants. The defendants need not post bond.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: April 6, 1976

SECTION 4141.01(I), OHIO REVISED CODE

(I) "Interested party" means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code.

SECTION 4141.01(B)(1)(b), OHIO REVISED CODE 4141.01(B)(3)(a), 4141.01(B)(3)(g)

(B)(1) "Employment" means:

(a) Service performed for wages under any contract of hire, written or oral, express or implied, including service performed in interstate commerce an service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation;

(b) Services performed by an individual for remuneration unless it is shown to the satisfaction of the administrator that such individual:

(i) Has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;

(ii) That such service is outside the usual course of the business for which service is performed; and

(iii) That such individual is customarily engaged in an independently established trade, occupation profession, or business.

(2) "Employment" includes:

(a) Service performed after December 31, 1971, by an individual in the employ of the state or any of its instrumentalities, or in the employ of the state and one or more other states or their instrumentalities, in the classified service as

defined in division (B) of section * 143.08 of the Revised Code or the services of employees covered by voluntary election, as provided under divisions (A)(4) and (5) of this section;

(i) Service performed after December 31, 1973, by an individual in the employ of any political subdivision of this state or any instrumentality of that political subdivision except for service performed as a substitute teacher employed by a public school district pursuant to section 3319.10 of the Revised Code.

(b) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational, or other organization which is excluded from the term "employment" as defined in the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301, solely by reason of section 26 U.S.C.A. 3306(c)(8) of that act and is not excluded under division (B)(3) of this section;

(c) Service not covered under division (B)(1)(b) of this section which is performed after December 31, 1971:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, laundry, or drycleaning services, for his employer or his principal;

(ii) As a traveling or city salesman, other than as on agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and in the transmission to his employer or his principal except for sideline sales activities on behalf of some other person of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale, or supplies for use in their business operations; provided that for the purposes of this subdivision, the services shall be deemed employment if the contractor of service contemplates that substantially all of the

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* Section 143.08 changed to 124.11, Amend. S.B. No. 174 Eff 12/4/73.

services are to be performed personally by the individual himself and that the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation, and the services are not in the nature of a single transaction that is not a part of a continuing relationship with the person for whom the services are performed.

(d) An individual's entire service performed within or both within and without the state if:

(i) The service is localized in this state.

(ii) The service is not localized in any state, but some of the service is performed in this state and either the base of operations, or if there is no base of operations then the place from which such service is directed or controlled, is in this state or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state.

(e) Service not covered under division (B)(2)(d)(ii) of this section and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state, the Virgin Islands, Canada, or of the United States, if the individual performing such service is a resident of this state and the administrator of the bureau of employment services approves the election of the employer for whom such services are performed; or, if he is not a resident of this state but the place from which the service is directed or controlled is in this state, the entire services of such individual shall be deemed to be employment subject to sections 4141.01 to 4141.46 of the Revised Code; provided service is deemed to be localized within this state if the service is performed entirely within this state or if the service is performed both within and without this state but the service performed without this state is incidental to

the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions;

(f) Service of an individual who is a citizen of the United States, performed outside the United States except in Canada or the Virgin Islands, after December 31, 1971, in the employ of an American employer, other than service which is "employment" under subdivisions (d) and (e) of this division or similar provisions of another state's law, if:

(i) The employer's principal place of business in the United States is located in this state;

(ii) The employer has no place of business in the United States, but the employer is an individual who is a resident of this state; or the employer is a corporation which is organized under the laws of this state, or the employer is a partnership or a trust and the number of partners or trustees who are resident of this state is greater than the number who are residents of any other state; or

(iii) None of the criteria of subdivisions (B)(2)(f)(i) and (ii) of this section is met but the employer has elected coverage in this state or the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under Chapter 4141. of the Revised Code.

(g) For the purposes of subdivision (B)(2)(f) of this section, the term "American employer" means an employer who is an individual who is a resident of the United States; or a partnership, if two-thirds or more of the partners are residents of the United States; or a trust, if all of the trustees are residents of the United States; or a corporation organized under the laws of the United States or of any state provided, the term "United States" includes the states, the District of Columbia, and the Commonwealth of Puerto Rico.

(h) Notwithstanding any other provisions of subdivisions (1) and (2) of division (B) of this section, service with respect to which a tax is required to be paid under any federal law

imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund, or service, which, as a condition for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301, is required to be covered under Chapter 4141. of the Revised Code.

(3) "Employment" does not include the following services if they are found not subject to the "Federal Unemployment Tax Act," 84 Stat. 713 (1970), 26 U.S.C.A. 3301, and if the services are not required to be included under division (B)(2)-(h) of this section:

(a) Agricultural labor;

(b) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;

(c) Service performed prior to January 1, 1972, in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of purely governmental functions. Service performed after December 31, 1971, in the employ of any instrumentality of the United States and the following services when performed for this state or a political subdivision as described in division (B)(2)(a) of this section except when performed for a public school district as described in section 3311.01 of the Revised Code, or a hospital or an institution of higher education as defined in divisions (X) and (Z), respectively, of this section as an elected official or any other employee not in the classified service as defined in division (B) of section 143.08* of the Revised Code.

(d) Service performed prior to January 1, 1972, in the employ of a private or parochial school, college, or university as a teacher, in research or experimental work, as an administrative officer, or as a member of the faculty. Service performed after December 31, 1971, in the employ of a nonprofit of

parochial school, not an institution of higher education as defined in division (Z) of this section;

(e) Service performed prior to January 1, 1972, as a short-time worker by a minor whose principal occupation is a student attending public or private school. Service performed after December 31, 1971:

(i) In the employ of a school, college, or university including those operated by the state or a political subdivision, if such service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university; or

(ii) By an individual under the age of twenty-two years who is enrolled at a nonprofit or public educational institution which normally maintains a regular facility and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, provided that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(f) Service performed by an individual in the employ of his son, daughter, or spouse and service performed by a child under the age of eighteen in the employ of his father or mother;

(g) Service performed for one or more principals by an individual who is compensated on a commission basis, who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971:

(i) By an individual for an employer as an insurance agent or as an insurance solicitor, if all this service is performed for remuneration solely by way of commission;

(ii) As a home worker performing work, according to specifications furnished by the employer for whom the services are performed, on materials or goods furnished by such employer which are required to be returned to the employer or to a person designated for that purpose.

(h) Service performed prior to January 1, 1972, in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefits of any private shareholder or individual, and the activities of which are confined exclusively to the rendition of service, or the production of commodities, for its respective religious, charitable, scientific, literary, or educational purposes. Service performed after December 31, 1971:

(i) In the employ of a church or convention or association of churches, or in an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be

readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work;

(i) Service performed after June 30, 1939, with respect to which unemployment compensation is payable under the "Railroad Unemployment Insurance Act," 52 Stat. 1094 (1938), 45 U.S.C. 351;

(j) Service performed by an individual in the employ of any organization exempt from income tax under section 501 of the "Internal Revenue Code of 1954," if the remuneration for such service does not exceed fifty dollars in any calendar quarter, or if such service is in connection with the collection of dues or premiums for a fraternal beneficial society, order, or association and is performed away from the home office or is ritualistic service in connection with any such society, order, or association;

(k) Casual labor not in the course of an employer's trade or business; incidental service performed by an officer, appraiser, or member of a finance committee of a bank, building and loan association, or savings association when the remuneration for such incidental service exclusive of the amount paid or alloted for directors' fees does not exceed sixty dollars per calendar quarter is casual labor;

(l) Service performed in the employ of a voluntary employees' beneficial association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if admission to a membership in such association is limited to individuals who are officers or employees of a municipal or public corporation, of a political subdivision of the state, or of the United States and no part of the net earnings of such association inures, other than through such payments, to the benefit of any private shareholder or individual;

(m) Service performed by an individual in the employ of a foreign government, including service as a consular or other officer or employee or of a nondiplomatic representative;

(n) Service performed in the employ of an instrumentality wholly owned by a foreign government if the service is of a character similar to that performed in foreign countries by employees of the United States or of an instrumentality thereof and if the administrator finds that the secretary of state of the United States has certified to the secretary of the treasury of the United States that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States and of instrumentalities thereof;

(o) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(p) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law, and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;

(q) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(r) Service performed in the employ of the United States or an instrumentality of the United States immune under the constitution of the United States from the contributions imposed by sections 4141.01 to 4141.46 of the Revised Code, except that to the extent that congress permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, sections 4141.01 to 4141.46 of the Revised Code, shall be applicable to such instrumentalities and to

services performed for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, individuals, and services; provided that if this state is not certified for any year by the proper agency of the United States under section 3304 of the "Internal Revenue Code of 1954," the payments required of such instrumentalities with respect to such year shall be refunded by the administrator from the fund in the same manner and within the same period as is provided in division (E) of section 4141.09 of the Revised Code with respect to contributions erroneously collected;

(s) Service performed by an individual as a member of a band or orchestra; provided such service does not represent the principal occupation of such individual, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971, for a nonprofit organization, a hospital or institution of higher education of this state, or a political subdivision, as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work-relief or work-training:

(t) Service performed in the employ of a day camp whose camping season does not exceed twelve weeks in any calendar year, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971:

(i) In the employ of a hospital, if the service is performed by a patient of the hospital, as defined in division (X) of this section; or

(ii) For a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution.

(u) Notwithstanding any other provisions of division (B)(3) of this section, services which are excluded under

subdivisions (g), (j), (k), and (l) of this division, shall not be excluded from employment when performed for a nonprofit organization, as defined in division (Y) of this section or for a hospital or institution of higher education of this state or for a political subdivision.

SECTION 4141.28(H), (I), (J), OHIO REVISED CODE

(H) Any interested party may appeal the administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith.

(I) Requests for reconsideration or appeals may be filed with the board, with the administrator or one of his deputies, with an employee of another state or federal agency, or with an employee of the unemployment insurance commission of Canada charged with the duty of accepting claims. Any timely written notice stating that the interested party desires a review of the previous determination or decision therefor, shall be accepted.

(J) When an appeal from a decision on reconsideration of the administrator or deputy is taken, all interested parties shall be notified and the board or a referee shall, after affording such parties reasonable opportunity for a fair hearing, affirm, modify, or reverse the findings of fact and the decision of the administrator or deputy in the manner which appears just and proper. In the conduct of such hearing or any other hearing on appeal to the board which is provided in this section, the board and the referees shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. The board and the referees shall take any steps in such hearing.

(1) The failure of the claimant or other interested party to appear at a hearing, unless he is the appealing party, shall not preclude a decision in his favor, if on the basis of all the information in the record, including that contained in the file of the administrator, he is entitled to such decision.

SECTION 4141.29, OHIO REVISED CODE

4141.29 Eligibility and qualification for benefits.

Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46 of the Revised Code.

(A) No individual is entitled to a waiting period or benefits for any week unless he:

(1) Has filed a valid application for determination of benefit rights in accordance with section 4141.28 of the Revised Code;

(2) Has made a claim for benefits in accordance with section 4141.28 of the Revised Code;

(3) Has registered at an employment office or other registration place maintained or designated by the administrator of the bureau of employment services. Registration shall be made in person or in writing in accordance with the time limits, frequency, and manner prescribed by the administrator.

(4)(a) Is able to work and available for suitable work and is actively seeking suitable work either in a locality in which he has earned wages subject to Chapter 4141. of the Revised Code, during his base period, or if he leaves such locality, then in a locality where suitable work is normally performed.

The administrator may waive the requirement that a claimant be actively seeking work when he finds that an individual has been laid off and the employer who laid him off has notified the administrator within ten days after the layoff, that work is expected to be available for the individual within a specified number of days not to exceed forty-five calendar days following the last day the individual worked. In the event the individual is not recalled within the specified period, such waiver shall cease to be operative with respect to such layoff.

(b) The individual shall be instructed as to the efforts that he must make in his search for suitable work, except where the active search for work requirement has been waived under division (A)(4)(a) of this section, and shall keep a record of where and when he has sought work in complying with such instructions and shall, upon request, produce such record for examination by the administrator.

(c) An individual who is attending a vocational training course, approved by the Ohio worker training committee or the administrator, meets the requirement of this division, if such attendance was recommended by the administrator and the individual is regularly attending the course, and is making satisfactory progress.

(d) An individual who becomes unemployed while attending a regularly established school and whose base period credit weeks were earned in whole or in part while attending such school, meets the availability and active search for work requirements of division (A)(4)(a) of this section if he makes himself available on any shift of hours for suitable employment with his most recent employer or any other employer in his base period, or for any other suitable employment to which he is directed, under Chapter 4141. of the Revised Code.

(e) The administrator shall adopt such rules and regulations as he deems necessary for the administration of division (A)(4) of this section.

(5) Is unable to obtain suitable work.

(B) An individual suffering total or partial unemployment is eligible for benefits for unemployment occurring subsequent to a waiting period of one week and no benefits shall be or become payable during this required waiting period, but no more than one week of waiting period shall be required of any such individual in any benefit year in order to establish his eligibility for total or partial unemployment benefits.

(C) The waiting period for total or partial unemployment shall commence on the first day of the first week with respect to which the individual first files a claim for benefits at an employment office or other place of registration maintained or designated by the administrator or on the first day of the first week with respect to which he has otherwise filed a claim for benefits in accordance with the rules and regulations of the bureau of employment services, provided such claim is allowed by the administrator or his deputy.

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

(1) For any week with respect to which the administrator finds that:

(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged in the dispute, or unless he actively participates in or

voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

(b) He has been given a disciplinary layoff for misconduct in connection with his work.

(2) For the duration of his unemployment if the administrator finds that:

(a) He quit his work without just cause or has been discharged for just cause in connection with his work, provided division (D)(2) of this section does not apply to the separation of a person under any of the following circumstances:

(i) Separation from employment for the purpose of entering the armed forces of the United States if he makes application to enter, or is inducted into such armed forces within thirty days after such separation;

(ii) Separation from employment pursuant to a labor-management contract or agreement, or pursuant to an established employer plan, program, or policy, which permits the employee, because of lack of work, to accept a separation from employment;

(iii) He has left his employment to accept a recall from a prior employer or to accept other employment as provided under section 4141.29' [4141.29.1] of the Revised Code, or has left employment which is or was concurrent employment where the remuneration, hours, or other conditions of such employment are substantially less favorable than his other work which was performed during such concurrent employment and where such employment, if offered as new work, would be

considered not suitable under the Provisions of dividions (E) and (F) of this section. Any benefits which would otherwise be chargeable to the account of the employer from whom an individual has left employment under conditions described in division (D)(2)(a)(iii) of this section, shall instead be charged to the mutualized account as provided in division (C) of section 4141.291 [4141.29.1] of the Revised Code.

(b) He has refused without good cause to accept an offer of suitable work when made by an employer either in person or to his last known address, or has refused or failed to investigate a referral to suitable work when directed to do so by a local employment office of this state or another state; provided, that this division shall not cause a disqualification for a waiting week or benefits under the following circumstances:

(i) When work is offered by his employer and he is not required to accept the offer pursuant to the terms of the labor-management contract or agreement, or pursuant to an established employer plan, program, or policy; or

(ii) When the individual is attending a vocational training course pursuant to division (A)(4) of this section except, in the event of a refusal to accept an offer of suitable work or a refusal or failure to investigate a referral, benefits thereafter paid to such individual shall not be charged to the account of any employer and, except as provided in division (B)(1)(b) of section 4141.241 [4142.24.1] of the Revised Code, shall be charged to the mutualized account as provided in division (C) of section 4141.25 of the Revised Code.

(c) Such individual quit work to marry or because of marital, parental, filial, or other domestic obligations or became unemployed because of pregnancy.

(d) He has knowingly made a false statement or representation or knowingly failed to report any material fact with the object of obtaining benefits to which he is not entitled.

(e) He became unemployed by reason of commitment to any penal institution.

(f) He became unemployed because of dishonesty in connection with his most recent or any base period work. Remuneration earned in such work shall be excluded from such individual's total base period remuneration for the purpose of determining the total benefits to which such individual is entitled under division (D) of section 4141.30 of the Revised Code, and shall be excluded from the maximum amount to be charged, under division (D) of section 4141.24 of the Revised Code, against the account of the employer who discharged such individual. In addition, no benefits shall thereafter be paid to such individual based upon such remunerations.

(E) No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work if:

(1) As a condition of being so employed he would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization.

(2) The position offered is vacant due directly to a strike, lockout, or other labor dispute.

(3) The work is at an unreasonable distance from his residence, having regard to the character of the work he has been accustomed to do, and travel to the place of work involves expenses substantially greater than that required for his former work, unless the expense is provided for.

(4) The remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

(F) In determining whether any work is suitable for a claimant in the administration of sections 4141.01 to 4141.46 of

the Revised Code, the administrator shall, in addition to the determination required under division (E) of this section, consider the degree of risk to the claimant's health, safety, and morals, his physical fitness for the work, his prior training and experience, the length of his unemployment, the distance of the available work from his residence, and his prospects for obtaining local work.

(G) "Duration of his unemployment," as used in this section, means the full period of unemployment next ensuing after a separation from any base period or subsequent work and until an individual has become re-employed in employment subject to sections 4141.01 to 4141.46 of the Revised Code, or the unemployment compensation act of another state, or of the United States, and until such individual has worked six weeks and has earned wages equal to three times his average weekly wage or three hundred sixty dollars, whichever is less, except for purposes of division (D)(2)(c) of this section, such term means the full period of unemployment next ensuing after a separation from such work and until such individual has become re-employed subject to the terms set forth above, and has earned wages equal to one half of his average weekly wage or sixty dollars, whichever is less, provided that in the case of a woman who became unemployed because of pregnancy such duration of unemployment shall continue until such time, after the date of her delivery, as she furnishes medical evidence that she is fully able to work, and that work with her former employer is no longer available, provided if she has made a bona fide change in residence which makes a return to work with her former employer unreasonable, because of distance, then her duration of unemployment may be ended the same as described in this division for disqualifications under division (D)(2)(c) of this section.

(H) Except as provided in division (B)(1)(b) of section 4141.241 [4141.24.1] of the Revised Code, if a claimant is disqualified under division (D)(2)(a), (c) or (e) of this

section, then benefits which may become payable to such claimant, which are chargeable to the account of the employer from whom he was separated under disqualifying conditions, shall be charged to the mutualized account provided in section 4141.25 of the Revised Code, such charges to be made in accordance with the charge sequence provided in section 4141.24 of the Revised Code; except, if the disqualification is for reason of pregnancy, under division (D)(2)(c) of this section, benefits shall be charged to the mutualized account only when the claimant has voluntarily discontinued her employment because of pregnancy.

(I) Benefits based on service in employment as provided in divisions (B)(2)(a) and (B)(2)(b) of section 4141.01 of the Revised Code, shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to Chapter 4141. of the Revised Code; except that benefits based on service in an instructional, research, or principal administrative capacity in an institution of higher education, as defined in division (Z) of section 4141.01 of the Revised Code, shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or contracts to perform services in any such capacity for any institution or institutions of higher education for both such academic years or both such terms. Benefits based on service in an instructional, research, or principal administrative capacity for a public school district shall not be paid to any individual for any week of unemployment which begins during the period between two successive academic years or terms of the employing school district provided the individual was in employment with the school district at the termination of the first such academic year or term.

SECTION 4141.301, OHIO REVISED CODE

4141.301 Extended benefits.

(A) As used in this section, unless the context clearly requires otherwise;

(1) "Extended benefit period" means a period which:

(a) Begins with the third week after whichever of the following weeks occurs first:

(i) A week for which there is a national "on" indicator; or

(ii) A week for which there is a state "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(i) The third week after the first week for which there is both a national "off" indicator and a state "off" indicator; or

(ii) The thirteenth consecutive week of such period;

Except, that no extended benefit period may begin by reason of a state "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state, and that within the period beginning on the effective date of this section and ending on December 31, 1971, an extended benefit period may become effective and be terminated in this state solely by reason of a state "on" indicator and a state "off" indicator, respectively.

(2) A "national 'on' indicator" exists for a week if the United States secretary of labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment, seasonally adjusted, for all states equaled or exceeded four and five-tenths per cent.

* * *

(4) There is a "state 'on' indicator" for this state for a week if the administrator determines, in accordance with the regulations of the United States secretary of labor, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment, not seasonally adjusted, under Chapter 4141. of the Revised Code:

* * *

Table 405.—Disqualification for Unemployemnt Caused by Labor Dispute

State (1)	Duration of disqualification: During stoppage of work due to dispute (29 States) (2)	Duration of disqualification: While dispute in active progress (12 States) (3)	Duration of disqualification: Other (11 States) (4)	Disputes excluded if caused by—: Employer's failure to conform to—: Contract (4 States) (5)	Disputes excluded if caused by—: Employer's failure to conform to—: Labor law (4 States) (6)	Disputes excluded if caused by—: Lockout (16 States) (7)	Individuals are excluded if neither they nor any of the same grade or class are—: Participating in dispute (43 States) (8)	Individuals are excluded if neither they nor any of the same grade or class are—: Financing dispute (30 States) (9)	Individuals are excluded if neither they nor any of the same grade or class are—: Directly interested in dispute (43 States) (10)
Ala.	—	x	—	—	—	—	—	—	—
Alaska	x	—	—	x	x	—	x	—	x
Ariz.	—	—	x[1]	x	x	—	x	x	x
Ark.	—	—	x[2]	—	—	x	x	—	x
Calif.	—	x	—	—	—	x[3]	—	—	—
Colo.	—	—	x[2]	—	—	x[10]	x	x	x
Conn.	—	—	x[1]	—	—	x	x	x	x
Del	x	—	—	—	—	—	—	—	—
D.C.	—	x	—	—	—	—	x	—	x
Fla.	—	x	—	—	—	—	x	x	x
Ga.	x[11]	—	—	—	—	x	x	x	x
Hawaii	x	—	—	—	—	—	x	—	x
Idaho	—	—	x[1]	—	—	—	x	x[4]	x
Ill.	x	—	—	—	—	—	x	x	x
Ind.	x[2 9]	—	—	—	—	—	x	x	x
Iowa	x	—	—	—	—	—	x	x	x
Kans.	x	—	—	—	—	—	x[7]	x	x[7]
Ky.	—	x	—	—	—	x	—	—	—
La.	—	x	—	—	—	—	x[4]	—	x[4]
Maine	x[5]	—	—	—	—	—	x	x	x
Md.	x	—	—	—	—	x	x	x	x
Mass.	x[5 11]	—	—	—	—	—	x	x	x
Mich.	—	—	x[2]	—	—	x[10]	x[4]	x[4]	x[4]
Minn.	—	x	—	—	—	x	x[12]	—	x[12]
Miss.	x	—	—	—	—	x	x	—	x
Mo.	x[2]	—	—	—	—	—	x	x	x
Mont.	x	—	—	—	x	—	x	x	x
Nebr.	x	—	—	—	—	—	x	x	x
Nev.	—	x	—	—	—	—	x	x	x
N.H.	x[2 5]	—	—	x	—	x	x	x	x
N.J.	x	—	—	—	—	—	x	x	x
N. Mex.	x	—	—	—	—	—	x	—	x
N.Y.	—	—	x[6]	—	—	—	—	—	—
N.C.	—	—	x[2]	—	—	—	—	—	—
N. Dak.	x	—	—	—	—	—	x	—	x
Ohio	—	—	x[1 10]	—	—	x	—	—	—
Okla	x	—	—	—	—	x	x	—	x
Oreg.	—	x	—	—	—	—	x	x	x
Pa.	x	—	—	—	—	x	x	—	x
P.R.	x	—	—	—	—	—	x	—	x
R.I.	—	—	x[6]	—	—	—	x[4]	x[4]	x[4]
S.C.	—	x	—	—	—	—	x	x[4]	x
S. Dak.	x	—	—	—	—	—	x	x	x
Tenn.	—	x	—	—	—	—	x	—	
Tex.	x[7]	—	—	—	—	—	x[7]	x[7]	x[7]
Utah	x[5 10]	—	—	—	x	x[3]	—	—	—
Vt.	x	—	—	—	—	—	x[4]	x[4]	x[2 4]
Va.	—	—	x[2]	—	—	—	x	x	x
Wash.	x	—	—	—	—	—	x	x	x
W. Va.	x[11]	—	—	x[8]		x	x	x	x
Wis.	—	x	—	—	—	—	—	—	—
Wyo.	x	—	—	—	—	—	x	x	x

(Footnotes on next page)

(Footnotes for Table 405)

[1] So long as unemployment is caused by existence of labor dispute.

[2] See text for details.

[3] By judicial construction of statutory language.

[4] Applies only to individual, not to others of same grade or class.

[5] Disqualification is not applicable if claimant subsequently obtains covered employment and: earns 8 x wba or has been employed 5 full wks., *Maine;* earns at least $900, *Mass.;* works at least 5 consec. wks. in each of which claimant earned 120% of wba, *N.H.;* earns $700 with at least $20 in each of 19 different calendar wks., *Utah.* However, BPW earned from ER involved in the labor dispute cannot be used to pay benefits during such labor dispute, *Mass.* and *Utah.*

[6] Fixed period: 7 consec. wks. and the waiting period or until termination of dispute, *N.Y.;* 6 wks. and waiting period, *R.I.* See Table 303 for waiting period requirements.

[7] So long as unemployment is caused by claimant's stoppage of work which exists because of labor dispute. Failure or refusal to cross picket line or to accept and perform available and customary work in the establishment constitutes participation and interest.

[8] Disqualification is not applicable if employees are required to accept wages, hours, or other conditions substantially less favorable than those prevailing in the locality or are denied the right of collective bargaining.

[9] Disqualification not applicable to any claimant who failed to apply for or accept recall to work with an ER during a labor dispute work stoppage if claimant's separation from ER occurred prior to work stoppage and was permanent.

[10] Applicable only to establishments functionally integrated with the establishments where the lockout occurs, *Mich.* Employee not ineligible: unless the lockout results from demands of employees as distinguished from an ER effort to deprive the employees of some advantage they already possess, *Colo.;* if individual was laid off and not recalled prior to the dispute, if separated prior to the dispute, if obtained bona fide job with another ER while dispute was in progress, *Ohio;* if the ER was involved in fomenting the strick, *Utah.*

[11] Disqualification ceases: when operations have been resumed but individual has not been reemployed, *Ga.;* within 1 wk. following termination of dispute if individual is not recalled to work, *Mass.* If the stoppage of work continues longer than 4 wks. after the termination of the labor dispute, there is a rebuttable presumption that the stoppage is not due to the labor dispute and the burden is on the ER to show otherwise, *W.Va.*

[12] Disqualification limited to 1 wk. for individuals not participating in nor directly interested in dispute.

CERTIFICATION OF STATES OF THE SECRETARY OF THE TREASURY

In accordance with the provisions of section 3304(c) of the Internal Revenue Code of 1954 (26 U.S.C. 3304 (c)), I hereby certify the following named States to the Secretary of the Treasury for the 12-month period ending October 31, 1975, in regard to the unemployment compensation laws of those States which heretofore have been approved under the Federal Unemployment Tax Act.

Alabama	Kentucky	Ohio
Alaska	Louisiana	Oklahoma
Arizona	Maine	Oregon
Arkansas	Maryland	Pennsylvania
California	Massachusetts	Puerto Rico
Colorado	Michigan	Rhode Island
Connecticut	Minnesota	South Carolina
Delaware	Mississippi	South Dakota
District of Columbia	Missouri	Tennessee
	Montana	Texas
Florida	Nebraska	Utah
Georgia	Nevada	Vermont
Hawaii	New Hampshire	Virginia
Idaho	New Jersey	Washington
Illinois	New Mexico	West Virginia
Indiana	New York	Wisconsin
Iowa	North Carolina	Wyoming
Kansas	North Dakota	

Signed at Washington, D.C. this 31st day of October, 1975.

JOHN T. DUNLOP,
Secretary of Labor

(FR Doc. 75-29727 Filed 11-4-15; 8:45am)

Federal Register, Vol. 40 No. 214—Wednesday, November 5, 1975, Page 51520.

Supreme Court, U. S.
FILED
JUN 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

and

ALBERT G. GILES,

Appellants,

vs.

LEONARD PAUL HODORY,

Appellee.

On Direct Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

---

MOTION TO DISMISS OR AFFIRM

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With MR. LORDEON on the Motion to Dismiss or Affirm

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IN THE

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October Term, 1975

No. 75-1707

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and

ALBERT G. GILES,

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Vs.

LEONARD PAUL HODORY,

Appellee.

On Direct Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court, pursuant to Rule 16(1)(d) of the Rules of this Court, to dismiss the appeal herein on the following grounds:

(1) Appellants' Question No. 1 was not decided by the District Court, or was presumptively decided in favor of Appellants, and, consequently, Appellants have no standing to assert that question as a basis for review; and

(2) Appellants' Question No. 5 presents an issue which was waived by Appellants' failure to assert it before the District Court; and, even assuming that the issue was not waived, it does not present a substantial federal question.

Appellee further moves the Court, pursuant to Rules 16(1)(c) and 16(1)(d) of the Rules of this Court, to affirm the judgment of the District Court on the following grounds:

(1) It is manifest that Appellants' Question No. 4

as a basis for decision of this cause is so unsubstantial as to not need further argument; and (2) It is manifest that Appellants' Questions No.2 and No. 3 as a basis for decision of this cause are so unsubstantial as to not need further agrument, and those questions were so manifestly decided right by the District Court, that the case ought not to be held for further argument.

STATEMENT OF THE CASE

The facts which formed the basis of the proceedings and decision below are adequately and concisely set forth in the Findings of Fact in the opinion of the District Court which has now been published in the Federal Supplement (Hodory v. Ohio Bur. of Emp. Services, 408 F. Supp. 1016 (N.D. Ohio E.D. 1976)), and Appellee adopts those Findings (408 F. Supp. 1018) as accurately reflecting the factual context in which the legal issues presented in this appeal must be determined. Appellee does not take exception with the Statement of the Case presented in the Jurisdictional Statement insofar as it is conformity with the findings of the District Court. However, Appellee must take strong exception to the statement (Jurisdictional Statement, p. 8) that briefs were submitted and oral arguments held before the three-judge court on the six issues enumerated at pages 7 and 8 of the Jurisdictional Statement. This assertion is totally misleading insofar as it tends to convey the impression that the District Court decided the case on substantive constitutional issues not briefed or argued before it. Appellee will not pretend to conceal well-warranted displeasure at Appellants' attempt to assert before this Court such a gross and critical misrepresentation concerning the conduct of the proceedings below. The Jurisdictional Statement itself reveals that the complaint below raised the issues of the constitutionality of Ohio Revised Code, Section 4141.29(D)(1)(a), under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States (Jurisdictional Statement, p. 6). The briefs of both Appellants and Appellee submitted to

the court below, fully discussed the due process and equal protection issues (Appendix hereto, pp. 14-17), and the questions were extensively argued before the three-judge panel.

ARGUMENT

A. APPELLANTS' QUESTION NO. 1 WAS NOT DECIDED BY THE DISTRICT COURT, OR WAS PRESUMPTIVELY DECIDED FAVORABLY TO APPELLANTS, GIVING APPELLANTS NO STANDING TO ASSERT THAT QUESTION AS A BASIS FOR REVIEW BY THIS COURT.

Appellants as their first question presented on this appeal ask this Court to consider whether the former Ohio labor dispute disqualification from receipt of unemployment compensation benefits conflicts with the Federal Social Security Act (Jurisdictional Statement, p.4). Appellee grants that this issue was raised and argued by him before the District Court, but that Court made no express finding on this issue in its opinion. (See Hodory v. Ohio Bur. of Emp. Services, 408 F. Supp. 1016 (N.D. Ohio E.D. 1976)). Since the issue was not expressly decided by the Court below, the decision of the District Court presents nothing on this question for review on appeal by this Court. Further, since the District Court was presented with both the statutory issue and substantive constitutional issues, and decided the case solely on the basis of the substantive constitutional issues, it must be presumed that the District Court decided the statutory issue favorably to Appellants and adversely to Appellee. While the presumed determination might form the basis of a cross-appeal by Appellee, it raises no issue which can form the basis of an appeal by Appellants. It is basic to the law of appellate review that an appeal brings up for review only that which was decided adversely to appellant (Loudon v. Taxing District, 104 U.S. 771, 774 (1881).

Appellee not having taken a cross-appeal, and the question as to whether the former Ohio labor dispute disqualification conflicts with the Federal Social Security Act having been presumptively decided favorably to Appellants by the Court below, that question provides no basis for setting this case for further argument at the behest of Appellants. Consequently, insofar as Question No. 1 is asserted as a basis for maintaining the instant appeal, the appeal

should be dismissed pursuant to Rule 16(1)(d) of the Rules of this Court.

B. APPELLANTS' QUESTION NO. 5 PRESENTS AN ISSUE WHICH WAS WAIVED BY APPELLANTS' FAILURE TO ASSERT IT BEFORE THE DISTRICT COURT; AND, EVEN ASSUMING THAT THE ISSUE WAS NOT WAIVED, IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants as their fifth question presented on this appeal ask this Court to consider whether the decision of the District Court deprived certain employers of their substantive and procedural due process rights under the Fifth and Fourteenth Amendments of the Constitution of the United States (Jurisdictional Statement, p. 4). Stripped of the constitutional trappings with which Appellants have clothed the question, it merely raises the issue of nonjoinder in the proceedings below of the principal employers of Appellee and others similarly situated. Appellants at best raise a question of nonjoinder of an indispensable party. Appellants have, however, presented this Court with no authority to support the contention that the employers were indispensable parties. Further, even assuming that the employers were indispensable parties, the objection of their nonjoinder was waived under Rule 12(h), Federal Rules of Civil Procedure, by Appellants' failure to make that objection at any stage of the proceedings below. During the period of over one year between commencement of the action and entry of judgment by the District Court, Appellants were fully aware of the asserted interests of the employers, but did not take a single, solitary step to secure their joinder or participation in the proceedings by way of intervention. In view of Appellants inaction, the only circumstance under which the objection of nonjoinder would not be waived is if the nonjoinder of the employers deprived the District Court of jurisdiction of the subject matter (F.R.C.P., Rule 12(h)(2)). Appellants have made no such contention before this Court, and have presented no authority which would support such a proposition.

Assuming, arguendo, that the objection of nonjoinder of the employers was not waived, Appellants have offered the Court no authority to support the position that such nonjoinder presents a substantial federal question of constitutional dimension. Consequently, Appellants' Question No. 5 presents no

issue which would justify setting this case for argument, and, insofar as that question is relied on to support this appeal, the appeal should be dismissed pursuant to Rule 16(d)(1) of the Rules of this Court.

C. IT IS MANIFEST THAT APPELLANTS' QUESTION NO. 4 AS A BASIS FOR DECISION OF THIS CAUSE IS SO UNSUBSTANTIAL AS TO NOT REQUIRE FURTHER ARGUMENT.

Appellants, as their fourth question presented on this appeal, ask this Court to consider whether the decision of the three-judge District Court is in conflict with other jurisdictions and against the weight of authority (Jurisdictional Statement, p. 4). This question, as a basis for decision of this cause, is so unsubstantial as not to require further argument. Appellants, to the accomodation of Appellee, have included in the Appendix to the Jurisdictional Statement a table summarizing the provisions of the labor dispute disqualifications of the fifty-two jurisdictions of the United States, consisting of the fifty states, the District of Columbia and Puerto Rico (Jurisdictional Statement, Appendix pp. 66-68). Examination of this table immediately reveals that in forty-three of the jurisdictions, individuals are excluded from disqualification if neither they nor employees of the same grade or class are participating the dispute of directly interested in the dispute. An employee is considered "directly interested" within the meaning of these statutes if his wages, hours of conditions of work will be affected by the outcome of the dispute. (See e.g., Martineau v. Director of Division of Emp. Sec!, 329 Mass. 44, 106 N.E. 2d 420, 424 (1952); see also The Purposes and Provisions of the "Labor Dispute" Disqualification from Unemployment Compensation. 56 Northwestern L. Rev. 662, 674 (1961)). Thirty of the above forty-three jurisdictions require, to avoid disqualification, that individuals also show that neither they nor employees of the same grade of class are financing the dispute. It is eminently clear that the disqualification imposed upon Appellee and his fellow steelworkers under former Ohio Revised Code, Section 4141.29(D)(1)(a), would not have been imposed in any of the above forty-three jurisdictions.

Examination of the labor dispute disqualifications in seven of the remaining nine of the fifty-two jurisdictions further reveals the frivolousness of Appellants' Question No. 4. The Alabama labor dispute disqualification has

been interpreted as to not deny benefits to an employee who becomes involuntarily unemployed by reason of a labor dispute in which he is in no way involved, and which he, his agents, or organization were powerless to prevent (Department of Industrial Relations v. Drummond, 30 Ala. App. 78, 1 So. 2d 395, 398 (1940), cert, den. 241 Ala. 142, 1 So. 2d 402 (1940); see also Ex Parte McCleney, 286 Ala. 288, 239 So. 2d 311, 314 (1970)). The relevant California statute clearly limits disqualification to persons who have voluntarily left their employment because of a trade dispute (Cal. Unemp. Ins. Code, Sec. 1262). The Supreme Court of Delaware has held the labor dispute disqualification in that state applicable only to individuals who are participating in the dispute, with even a direct interest in the outcome being insufficient to disqualify (Lowe Bros., Inc. v. Unemp. Ins. App. Bd., 332 A.2d 150, 153 (Del. 1975)). The labor dispute disqualification in the state of Kentucky applies only where there is a dispute in active progress at the establishment where the individual is or was employed (K.R.S., Sec.341.360(1)). The Court of Appeals of Kentucky, in a highly informative opinion in United States Steel Corp. v. Brown, 441 S.W. 2d 205 (Ky.1969), determined that a coal processing plant and mining operations, ninety miles apart and within the state, did not constitute a single establishment within the meaning of the labor dispute disqualification. The court's decision in Brown was in harmony with its prior ruling in Ford Motor Co. v. 243 S.W. 2d 657(Ky. 1951), Kentucky Unemp. Comp. Com'n., /holding that automobile assembly plants in Kentucky and assembly plants in Michigan did not constitute the same establishment within the meaning of the labor dispute disqualification.

The New York labor dispute disqualification suspends benefits for seven weeks where an individual has lost his employment because of a strike, lockout, or industrial controversy at the establishment in which he was employed (Consol. Laws of N.Y., Labor Law, Sec. 592). In an enlightening, recent decision interpreting that statute, the court determined that employees at a particular automobile plant, not on strike, were not disqualified when production was curtailed due to strikes at assembly plants operated by the employer at other locations (Farina v. General Motors Corp., 41 A.D.2d 98, 341 N.Y.S.2d 460 (1973), mot. for leave to appeal den., sub. nom. Farina v. Levine, 32 N.Y.2d 612, 246

N.Y.S.2d 1026 (1973)). Under the labor dispute disqualification in Utah, an individual is disqualified only where his unemployment is due to a strike involving his grade, class, or group of workers at the factory or establishment where he is or was last employed (Utah Code Ann., Sec. 35-4-5(d)). The relevant Wisconsin statute disqualifies an employee who has left or lost his employment because of a bona fide labor dispute in active progress in the establishment where he is or was employed (W.S.A., Sec. 108.04(10)). The Supreme Court of Wisconsin has held in a very recent decision that the statute did not disqualify airline ground employees laid off at terminals in Madison and Milwaukee because of a strike by pilots and establishment of picket lines in Minneapolis, Minn., and Seattle, Wash. (Abendroth v. Wis. Dept. of I., L. & H. Rel., 69 Wis. 2d 736,233 N.W. 2d 343 (1975)).

The above analysis of the labor dispute disqualifications in the seven states of Alabama, California, Delaware, Kentucky, New York, Utah and Wisconsin, coupled with analysis of the relevant statutes in the forty-three jurisdictions having the most common type of provisions, clearly demonstrates that Appellee and his fellow workers would not have been denied unemployment compensation benefits in fifty of the fifty-two jurisdictions of the United States. Since the West Virginia coal mine strike which caused disqualification of Appellee and his fellow Ohio steelworkers, amendment of the Ohio statute has raised the total to fifty-one of fifty jurisdictions in which a disqualification would not be imposed upon persons who became unemployed under the circumstances of Appellee. (As to the amendment to the Ohio Law, see Hodory v. Ohio Bur. of Emp. Services, 408 F. Supp. 1016, 1018 (N.D. Ohio E.D. (1976).) In view of this state of the law, it is manifest that any question as to whether the decision of the District Court is in conflict with other jurisdictions, and against the weight of authority, is so unsubstantial as to not require further argument. Therefore, insofar as Appellants rely on their Question No. 4 to justify plenary review in this case, the judgment of the District Court should be affirmed pursuant to Rule 16(1)(c) of the Rules of this Court.

D. IT IS MANIFEST THAT APPELLANTS' QUESTIONS NO. 2 and 3 AS A BASIS FOR DECISION OF THIS CAUSE ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT, AND THOSE QUESTIONS WERE SO MANIFESTLY DECIDED RIGHT BY THE DISTRICT COURT THAT THE CASE OUGHT NOT TO BE HELD FOR FURTHER ARGUMENT.

Appellants, as their second question raised on this appeal, ask this Court to consider whether a state system of unemployment compensation can predicate disqualification on grounds other than fault; and, as their third question, ask this Court to consider whether application of former Ohio Revised Code, Section 4141.29(D)(1)(a), to disqualify Appellee and others similarly situated from receipt of unemployment compensation benefits, was justified by a suitable governmental interest (Jurisdictional Statement, p.4). These two questions in substance raise only one issue, the issue of whether a suitable governmental interest was served by application of the former statute to deny benefits to steelworkers laid off in Ohio due to a coal mine strike in West Virginia, where the Ohio workers had no connnection whatsoever with the labor dispute in the other state.

All parties have agreed at all stages of these proceedings that the suitable governmental interest served by a labor dispute disqualification from receipt of unemployment compensation benefits is to preserve the "neutrality" of the state in labor controversies. (See Jurisdictional Statement, P.9; see also, generally, Unemployment Compensation in Labor Disputes, 49 Yale L.J. 461, 463-464 (1940); The Purposes and Provisions of the "Labor Dispute" Disqualification from Unemployment Compensation, 56 Northwestern U.L. Rev. 662,663-664(1961); Effect of Participation in Labor Dispute upon Continuation of Unemployment Compensation, 52 Cornell L.Q. 738, 749-750 (1967).) The District Court squarely dealt with the question as to whether the above well-recognized interest was served by disqualifying Appellee and others similarly situated, reached the eminently correct decision that no suitable governmental interest was served by the disqualification, and concluded, therefore, that application of the challenged statute to disqualify Appellee and his fellow abridged their right to equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States (Hodory v. Ohio Bur. of Emp. Services, 408 F.Supp. 1018, 1022-1022 (N.D. Ohio E.D. (1976)). The Court also quite correctly

determined that the challenged application of the former statute did not bear a real and substantial relation to accomplishment of a legitimate state purpose, and was therefore violative of the guarantee of due process of law under the Fourteenth Amendment (408 F. Supp. 1022).

As pointed out in the discussion under Part C, above, denial of benefits to Appellee and his fellows would have occurred under the laws in only two of fifty-two jurisdictions, and that such a denial would now only occur in one of fifth-two. While this is not conclusive as to whether the disqualification sufferred by Appellee and his fellows was in furtherance of a suitable governmental interest, the fact that fifty-one of the fifty-two jurisdictions of the United States do not consider such a disqualification necessary, to serve a suitable governmental interest, gives overwhelming support to the conclusion that such a disqualification does not in fact serve any such interest.

To comment in passing on the law of the one non-conforming jurisdiction, North Carolina, Appellee is aware of Abernathy v. Eastern Airlines, 259 N.C. 190, 130 S.E. 2d 292 (1963), cert. den., 375 U.S. 161, 11 L.Ed.2d 261, 84 S.Ct. 274 (1963). (This Court's denial of certiorari, of course, imports no expression of opinion on the merits of the Abernathy case.) However, insofar as Abernathy might constitute authority for the proposition that denial of unemployment compensation benefits to Appellee and his fellows was constitutionally permissible, Appellee, with all due respect to the high court of North Carolina, maintains that the Abernathy decision was the product of inadequate analysis of constitutional issues, and was incorrectly decided.

Treating Appellants' Questions No. 2 and 3 as asking the Court to consider whether a suitable governmental interest was served by disqualification of Appellee and others similarly situated, it is manifest that such a question as a basis for decision in this cause is so unsubstantial as to not require further argument. Also, this question was so manifestly decided right by the District Court, that, for this further reason, this case ought not be held for further argument. (See Arrowsmith v. Harmoning, 118 U.S. 194, 195, 30 L.E. 243, 6 S. Ct. 1023 (1886); Texas & N.O.R.R. Co. v. Miller, 221 U.S. 408, 416-417, 55 L.E. 789, 31 S. Ct. 534 (1911).) Consequently, the judgment of the District

Court should be affirmed pursuant to Rules 16(1)(c) and 16(1)(d) of the Rules of this Court.

CONCLUSION

For the reasons fully set forth above in this Motion to Dismiss or Affirm, the appeal from the judgment of the three-judge panel of the United States District Court for the Northern District of Ohio, enjoining enforcement of former Ohio Revised Code, Section 4141.29(D)(1)(a), so as to deny payment of unemployment compensation benefits to Appellee and others similarly situated, should be dismissed. Further, in the alternative, for the reasons fully set forth above, the judgment of the District Court should be affirmed without this case being held for further argument.

Respectfully submitted,

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Fred A. Culver

FRED A. CULVER

With MR. LORDEON on this Motion to Dismiss or Affirm

11-

FILED
Jan 17 - 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY, Plaintiff v. OHIO BUREAU OF EMPLOYMENT SERVICES, et al., Defendants	No. C 75-15 Y MEMORANDUM OPINION AND ORDER

LAMBROS, DISTRICT JUDGE

Plaintiff filed the above-captioned action on behalf of himself and all other individuals similarly situated, seeking the issuance of an injunction against the continued enforcement of §4141.29(D)(1)(a) of the Ohio Revised Code and the issuance of a declaratory judgment that §4141.29(D)(1)(a), which relates to determinations of an applicant's right to unemployment compensation, is unconstitutional on its face and as applied and violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and §303(a)(1),(3) of the Social Security Act of 1935, as amended, 42 U.S.C. §503(a)(1),(3). Plaintiff has requested the convening of a three-judge panel pursuant to 28 U.S.C. §§2281 and 2284.

Upon due consideration of the pleadings and the briefs filed herein, the Court concludes that the plaintiff's constitutional attack is not insubstantial, and that the complaint properly alleges a basis for equitable relif. Accordingly, it is necessary that a three-judge panel be

convened to hear and determine the issues raised in this action. Noe v. True, ___F.2d___(6th Cir. Dec. 5, 1974); Bailey v. Patterson, 369 US 31 (1961).

Although questions of abstention and jurisdiction have been raised with regard to the claims presented by plaintiff, these questions will be addressed to and determined by the three-judge court.

The plaintiff's request for a three-judge panel is granted, and accordingly, the Court will request the Honorable Harry Phillips, Chief Judge of the United States Court of Appeals for the Sixth Circuit, to designate a panel to hear and decide the issues in this case.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 7/11/75

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EXCERPT FROM PAGE 11 OF "BRIEF OF PLAINTIFF HODORY", FILED AND SERVED IN THE PROCEEDINGS BELOW ON OCTOBER 10, 1975

* * * * * * * * * *

III.

SECTION 4141.29(D)(1)(A) OF THE OHIO REVISED CODE, IN REQUIRING DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO PERSONS WHO BECOME UNEMPLOYED BECAUSE OF A LABOR DISPUTE, WHERE SUCH PERSONS IN NO WAY ARE PARTICIPATING IN, FINANCING, OR DIRECTLY INTERESTED IN THE DISPUTE, DENIES SUCH PERSONS THEIR RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Plaintiff, for his Third Cause of Action, on behalf of himself and all others similarly situated, alleges that the application by Defendant Ohio Bureau of Employment Services of Section 4141.29(D)(1)(a), Ohio Revised Code, to deny unemployment compensation benefits to Plaintiff and such other persons, constitutes a deprivation of their constitutional right to equal protection of the laws. The specific statute in question is part of a general statutory scheme contained in Chapter 4141 of the Ohio Revised Code, enacted pursuant to the federal Social Security Act, to provide for payment of compensation benefits to unemployed persons. As was fully discussed in Part II of this Brief, the overriding purpose of such legislation is to provide benefits for persons involuntarily unemployed without fault of their own.

" " " " " " " " " "

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EXCERPT FROM PAGE 16 OF "BRIEF OF PLAINTIFF HODORY", FILED AND SERVED IN THE PROCEEDINGS BELOW ON OCTOBER 10, 1975

* * * * * * * * * * *

IV

SECTION 4141.29(D)(1)(a) OF THE OHIO REVISED CODE, IN REQUIRING DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO PERSONS WHO BECOME UNEMPLOYED BECAUSE OF A LABOR DISPUTE, WHERE SUCH PERSONS ARE IN NO WAY PARTICIPATING IN, FINANCING, OR DIRECTLY INTERESTED IN THE DISPUTE, DENIES SUCH PERSONS THEIR RIGHT TO DUE PROCESS OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Plaintiff, for his Fourth Cause of Action, on behalf of himself and others similarly situated, alleges that the application by Defendants of Section 4141.29(D)(1)(a), Ohio Revised Code, to deny unemployment compensation benefits to Plaintiff and such other persons, constitutes a deprivation of their constitutional right to due process of law. A state's authority to enact unemployment compensation legislation has been justified on the basis of the police power of the state (Cottrell Clothing Co. v. Teets, 139 Colo. 558, 342 P.2d 1016 (1959); see also, Barnes v. Board of Review, Ohio Ct. of App., Montgomery Cty., Case No. 3948, Sept. 7, 1972, a copy of which opinion is attached as Appendix "A" to Plaintiff's Brief in Support of Jurisdiction, herein on file). However, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States always operates as a limitation on the improper exercise of the police power. (See generally, Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 441-442, 54 L. Ed. 826, 30 S. Ct. 535 (1910); see also 16 Am. Jur. 2d, "Constitutional Law," Sec. 296, at p. 530.) In order to constitute a proper exercise of the police power, legislation must directly promote the general health, safety, welfare, and morals, and be reasonable, and the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in operation, and have a real and substantial relation to such purpose (Yeagardin v. Foley, 166 Ohio St.449(1957); Froelich v. City of Cleveland, 99 Ohio St.376 (1919); Nolden v. City Commission, 12 Ohio Misc. 205 (1966)).

* * * * * * * * * * *

15

EXCERPT FROM "ANSWER BRIEF OF DEFENDANTS", FILED AND SERVED IN THE PROCEEDINGS BELOW ON OCTOBER 20, 1975, BY RICHARD A. SZILAGYI, ASSISTANT ATTORNEY GENERAL

* * * * * * * * * *

III. THERE IS A STRONG PRESUMPTION IN FAVOR OF THE CONSTITUTIONALITY OF A DULY ENACTED STATUTE. IN ORDER TO OVERCOME THIS PRESUMPTION OF VALIDITY, IT MUST BE ESTABLISHED BEYOND A REASONABLE DOUBT THAT THE STATUTE AND SOME CONSTITUTIONAL PROVISIONS ARE CLEARLY INCOMPATIBLE.

Ohio Revised Code, Section 4141.29(D)(1)(a) does not violate the provisions of the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution; Section 303(a)(1), (3) of the Social Security Act of 1935, as amended; 42 U.S.C. Section 503(a)(1), (3) or any other provisions of the Federal Statutes relating to Unemployment Compensation.

* * * * * * * * * * *

16

EXCERPT FROM "ANSWER BRIEF OF DEFENDANTS", FILED AND SERVED IN THE PROCEEDINGS BELOW ON OCTOBER 20, 1975, BY RICHARD A. SZILAGYI, ASSISTANT ATTORNEY GENERAL

* * * * * * * * * * * *

IV. THE ACTION OF THE BOARD OF REVIEW, BUREAU OF EMPLOYMENT SERVICES UNDER SECTION 4141.29(D)(1)(a), REVISED CODE DID NOT CONSTITUTE INDIVIOUS DISCRIMINATION AND WAS NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION OR ARTICLE I, SECTIONS 2 AND 16 OF THE OHIO CONSTITUTION.

* * * * * * * * * * * *

Supreme Court, U. S.
FILED
NOV 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

ALBERT G. GILES,

Appellants,

VS.

LEONARD PAUL HODORY,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

ALBERT G. GILES,

Appellants,

VS.

LEONARD PAUL HODORY,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLANT

Opinion Below

The Opinion of the District Court [reproduced in the Appendix to the Brief of Appellant] is reported at 408 F. Supp. 1016

JURISDICTION

The judgment and opinion of the United States District Court for the Northern District of Ohio, Eastern Division was entered on March 4, 1976. The Jurisdictional Statement of the Appellant was filed on May 25, 1976 and Probable Jurisdiction was noted on October 4, 1976. The jurisdiction of this court rests on 28 U.S.C. 1253.

STATUTE INVOLVED

The applicable statutory provision involved in this appeal is Section 4141.29(D)(1)(a) Revised Code of Ohio. Section 4141.29 Revised Code of Ohio is set forth in its entirety in the Appendix to Appellant's Brief.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Is Ohio's labor dispute disqualification as in effect at the time of the labor dispute in question in conflict with the Federal Social Security Act?

(2) Can a state system of Unemployment Compensation predicate disqualification from benefits on grounds other than fault?

(3) Was there a suitable governmental interest underlying the Ohio "Labor Dispu " disqualification as in effect at the time of the strike such that Section 4141.29(D)(1)(a) was not unconstitutional as applied to Leonard Paul Hodory and those similarly situated?

(4) Is the decision of the Three Judge District Court in conflict with other jurisdictions and against the weight of authority?

(5) Does the decision of the Three Judge District Court deprive the respective employers of their substantive and procedural due process rights under the 5th and 14th Amendments?

STATEMENT OF THE CASE

This case involves the constitutionally of Section 4141.29(D)(1)(a), Ohio Revised Code, which contains essentially the same language as the original statute enacted in 1936.

Several amendments to the statute have been made for clarification purposes, but the wording contained in (D)(1)(a) has been in effect since 1963.

This section disqualifies a claimant from receiving unemployment benefits when he becomes unemployed due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed. An individual is disqualified in cases where his unemployment is caused by a labor dispute at another place, either within or without this state, if owned or operated by the same employer and which supplies materials or services necessary to continue the operation of the individual claimant's last place of employment.

Plaintiff-appellee was one of more than twelve hundred fifty steelworkers furloughed by United States Steel Corporation and Republic Steel Corporation as a result of a national strike by the United Mine Workers at coal mines owned and operated by both steel companies. These company owned mines supplied fuel for the operation of the various facilities engaged in the manufacturing of steel products owned and operated by U.S. Steel Corporation and Republic Steel Corporation in Ohio which were forced to shut down due to the lack of fuel.

A large number of other steel workers employed by U.S. Steel Corporation and Republic Steel Corporation at other Ohio facilities were also affected by the strike, and perfected their appeal to the Ohio Bureau of Employment Services pursuant to Section 4141.28, Ohio Revised Code. The Bureau, upon hearing evidence from all concerned parties, granted benefits to these employees on the basis that the company owned coal mines did not supply a sufficient amount of fuel to effect a plant shut down. The Steel companies are appealing these decisions in the state courts.

Plaintiff-appellee and his co-workers filed applications for unemployment benefits with the Ohio Bureau of Employment Services which were disallowed for the reason that the labor dispute at the coal mines owned and operated by United States Steel Corporation was the cause of the claimant being unemployed. The decision of the Ohio Bureau of Employment Services wherein the plaintiffs-appellees were disqualified from receiving benefits was consistent with previous Bureau and Board of Review decisions, case law in Ohio, as stated in *Cornell* v. *Bailey*, 163 Ohio St. 50, 25 N.E. 2d 323 (1955) and *Adamski* v. *Bureau of Unemployment Compensation*, 108 Ohio App. 82, 155 N.E. 2d 518 (1959) and in other states having the same or similar disqualifications. *Abernathy* v. *Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963) Certiorari denied, U.S. Sup. Ct. 375 U.S. 161 (1963); *Spielmann* v. *Industrial Commission*, 236 Wis. 240, 295 N.W. 1 (1940); *Chrysler Corp.* v. *Smith*, 297 Mich. 438, 298 N.W. 87 (1941). These appeals are now pending before the Board of Review but are being stayed pending a final decision in this case.

Plaintiff-appellee, during the pendency of his appeal in the state administrative process, filed this class action against the Ohio Bureau of Employment Services and Albert G. Giles, Administrator, on behalf of himself and all others similarly situated in the United States District Court, Northern District of Ohio, Eastern Division pursuant to 42 U.S.C. Section 1983 seeking declaratory and injunctive relief on the grounds that Ohio Revised Code, Section 4141.29(D)(1)(a) was unconstitutional on its face and as applied, violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 303(A)(1), (3) of the Social Security Act of 1935, as amended, 42 U.S.C. Section 503(a) (1), (3).

Plaintiff-appellee did not name as defendant his employer, United States Steel Corporation, Ohio Works, Youngstown, Ohio nor did he name as defendants the other United States

Steel Corporation facilities or Republic Steel Corporation, employers of the class which plaintiff-appellee alleged to represent, and whose financial interests would be substantially affected by any decision in this case.

Ohio Revised Code, Section 4141.28(0) mandates that all interested parties be named appellees in any state proceeding in order for each party to protect their respective interests. United States Steel Corporation and Republic Steel Corporation both have a substantial financial interest in the instant case because it is their respective accounts that will be affected as a result of a final decision in this case.

This case proceeded as a class action and upon motion by Plaintiffs-appellees, the United States District Court convened a three judge panel to determine the constitutionality of Section 4141.29(D)(1)(a), Ohio Revised Code.

Defendant's-appellants' opposition consisted of the following:

(1) The case is not a proper case for a three judge district court in an action for an injunction for money damages.
(2) Plaintiffs-appellees failed to exhaust their remedy at law.
(3) Plaintiff Hodory and his co-workers had a pending appeal before the Board of Review, Ohio Bureau of Employment Services.
(4) Plaintiffs-appellees failed to meet the requirements of Federal Rules of Civil Procedure, Rule 23(b)(3)
(5) The unemployment compensation laws in Ohio are solely the state's concern and have not been preempted by the Federal Government.
(6) The U.S. District Court should abstain from hearing the case on the basis of (a) comity and (b) Plaintiff-appellee was already in litigation on the issues of entitlement to benefits before the Board.

Briefs were submitted and oral arguments were heard by the three judge panel on the above issues. No evidentiary hearing was held to submit evidence on the merits or evidence presented to show the impact on the unemployment fund and employer's accounts nor the special interests of the defendants. Neither U.S. Steel Corporation or Republic Steel Corporation, the employers, were parties to this action.

The three judge court issued its Memorandum Opinion and Order on March 5, 1976 (Appendix p. 1) wherein the court held:

(1) Abstention would not be proper in this case. (Appendix p. 4)
(2) The prerequisites to certification of a class action under 23(a) have been met. (Appendix p. 7)
(3) Defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. (Appendix p. 10)
(4) Section 4141.29(D)(1)(a) as applied violated plaintiff's rights under the Equal Protection Clause of the 14th Amendment and the rights guaranteed by 42 U.S.C. Section 1983. (Appendix p. 11)

Final judgment was entered May 5, 1976 (Appendix 13). Defendants' Motion for a Stay Order, pending this appeal was granted on April 6, 1976 (Appendix 14).

SUMMARY OF ARGUMENT

It is the position of the Appellant that Ohio's labor dispute disqualification was enacted pursuant to the police power of the state and that it is supported by reasonable and rational policy considerations. These considerations include the desire of the state to preserve the fiscal integrity of its program by limiting unemployment insurance coverage to a manageable pool of risks, and the desire of the state to maintain a position of neutrality in labor matters. A necessary corollary to these arguments is the proposition that the State of Ohio has an interest and a right to keep its unemployment insurance program from mushrooming into a costly general welfare or income maintenance system. The Appellant further feels that the classifications created under the Ohio law here in issue are not arbitrary or invidious, but necessary if the State of Ohio is to maintain its system without recourse to emergency federal funding from the General Revenue Fund. In this context the Appellant feels that the court below erred in imposing an impermissibly heavy burden upon the State of Ohio in order to uphold the validity of its programs.

The Appellant further contends that the federal-state cooperative nature of Ohio's Unemployment Insurance system is not in conflict with the Social Security Act and creates no federal substantive right to unemployment compensation benefits. Any rights arising thereunder are state created rights and are not appropriate subject matter for consideration by a three judge district court in a 42 U.S.C. 1983 action.

Appellant further asserts that the decision of the three judge district court, predicated as it was on the belief that an unemployment insurance system could only be based upon fault, was in error.

Appellant contends that the decision of the three judge district court went beyond the scope of judicial review and entered the realm of judicial lawmaking and in so doing

deprived U.S. Steel and Republic Steel of their due process rights by imposing a crushing financial burden on their unemployment accounts and by causing them to face higher tax assessments in the future.

Appellant concludes by showing that the Ohio approach to the labor dispute disqualification is in accord with a line of case authority from both state courts and this court extending from the mid 1930's to the present.

ARGUMENT

A. The Classifications Resulting from Ohio's "Labor Dispute" Disqualification as in Effect at the time of this Labor Dispute are Supported by Reasonable and Substantial Bases and Further a Suitable Governmental Interest.

Unemployment insurance, one of the aspects of the Social Security Program, is a co-ordinated federal-state effort designed to provide economic security for those workers who have a sufficient attachment to the labor market to establish an employer-employee relationship and who become unemployed under various conditions, generally because of loss of work due to severe economic conditions. In general, the program is financed out of taxes, or "contributions", as they are commonly referred to in state unemployment laws, imposed upon employers under State law and the Unemployment Tax Act, 42 U.S.C. Section 3301 *et seq.* and various State statutes. Most states, between 1935 and 1939, enacted unemployment statutes in order to participate in the Federal Administrative Fund pursuant to 42 U.S.C. Section 503. Employers were allowed credit on their federal taxes, 42 U.S.C. Sections 3302 and 3303, if the State in which they were subject to taxes had an approved State unemployment plan. "Unemployment Funds" are special funds, established under a State Law and administered by a State Agency, for the payment of compensation. 26 U.S.C. Section 3306(f). State funds deposited in the federal unemployment trust fund are a continuing appropriation for a specific purpose, and the federal government does not obtain

title to the monies but holds it in trust for the State Unemployment Agency. *Gillum* v. *Johnson*, 62 P. 2d 1037, 7 Cal. 2d 774; rehearing denied 63 P. 2d 810, 7 Cal. 2d 744.

The Unemployment Tax Act, 26 U.S.C. Section 3304 (a)(5) contains the only language that imposes a restriction on the States in denying benefits; two of the three involve labor relations:

> "(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing the accept new work under any of the following conditions:
>
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
>
> (C) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;
>
> (6) all the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time."

It is clear that States have a wide range of differences in the unemployment area as is apparent from the "Comparison of State Unemployment Insurance Laws", U.S. Department of Labor (1972).

It is important at this juncture to point out that since the Social Security Act of 1935 became effective, the states have been unbridled by Federal control in two important areas of local concern—coverage and exemptions. In *Claim of Cassare-*

tahis, 44 N.E. 2d 391, 289 N.Y. 119 (1942) Motion denied 47 N.E. 2d 438, 289 N.Y. 838, affirmed 63 S. Ct. 1067, 319 U.S. 306 the court opined that Congress intended to leave the States the widest possible latitude in setting up unemployment compensation systems, both as to the kind and to the extent of coverage provided, notwithstanding the provisions of Section 1600, *et seq.* of the Internal Revenue Code of 1939 (Now contained in 26 U.S.C. Section 3302). See also: *A. J. Meyer & Co.* v. *Unemployment Compensation Commission*, 152 S.W. 2d 184, 348 Mo. 147 (1941) and *Buckstaff Bath House Co.* v. *McKinley*, 60 S. Ct. 279, 308 U.S. 358, 84 L. Ed. 322 (1939).

The Plaintiffs-appellees contend that Section 4141.29(D)-(1)(a), Ohio Revised Code creates two classes of unemployment claimants--one where the claimant receives benefits when he becomes unemployed through no fault of his own and second, where the claimant is denied benefits when he becomes unemployed through no fault of his own because the main plant where he works is forced to close because it cannot obtain coal as a result of a strike at the company owned, fully integrated, facility. This distinction, plaintiff-appellee claims, fails to meet the "rational basis" test for equal protection under the Fourteenth Amendment.

In the area of social welfare legislation, federal courts are, as a general rule, reluctant to infringe upon the states' prerogatives. *Weinberger* v. *Salfi*, U.S. , 95 S. Ct. 2457 (1975); *Geduldig* v. *Aiello*, 417 U.S. 484, 94 S. Ct. 2485, 417 L. Ed. 2d 256 (1974); *Jefferson* v. *Hackney*, 406 U.S. 525, 92 S. Ct. 1724 (1972). In *Dandridge* v. *Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), disclaiming any intention to impose a federal viewpoint in the field of social policy, the court stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause because the classification made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Supra*, at 485.

With *Dandridge, supra*, as a convenient starting place, a number of important principles emerge from the cases. First, a legislative body need not address a perceived social evil in its entirety but may approach the problem one step at a time. *Dandridge* v. *Williams, supra* at 486-487. See *Geduldig* v. *Aiello, supra; Romero* v. *Hodgson*, 319 F. Supp. 1201 (N.D. Cal. 1970) affirmed, 403 U.S. 901 (1970). Second, the federal court will not attempt to evaluate the fine policy considerations, practical problems and political compromises that enter into and shape legislative intent. *Weinberger* v. *Salfi, supra; Dandridge* v. *Williams, supra* at 485; *Von Stauffenberg* v. *District Unemployment Compensation Board*, 459 F. 2d 1128 (D.C. Cir. 1972), *Atchison* v. *Matthew*, 174 U.S. 106, 19 S. Ct. 609 (1899). Third, a statutory program will survive a constitutional attack if any state of facts can be adduced to provide a "rational basis" for the legislative judgment. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 57 S. Ct. 868 (1937); *In re Stalham*, 483 F. 2d 436 (1937), cert. denied 94 S. Ct. 578, 414 U.S. 1069 (1973).

The State of Ohio possesses a legitimate interest in assuring an adequate monetary reserve in its unemployment fund since its resources are limited by the tax rate on employers which is set by the state legislature. *Geduldig* v. *Aiello, supra.* Further, the reservoir is not unlimited; liberalization of benefits without a corresponding replenishment could rapidly run the reservoir dry. In fact, twenty-one states have already bankrupted their trust funds as of October 1976, but this will be treated later in more detail. Should this Court invalidate the statute under consideration in this case two consequences will result. First, if retroactive benefits are required to be paid, it would be an

encroachment upon the unemployment policies of the state by the federal courts, leading to the expenditure of state monies that it had not intended to expend and second, this would deny the General Assembly of Ohio the right to engineer and design their own social program as contemplated by the Federal government, which has resisted attack by various interest groups in the courts for the past 40 years and prohibited by the holdings in this court in *Dandridge, supra.* This would be not only repugnant to the Tenth Amendment of the United States Constitution and to the entire concept of the unemployment compensation program, but would be an encroachment into future recipients' rights to benefits under legitimate earned benefit payments by depleting the fund.

Plaintiffs-appellees next contend that the apex of the Federal Unemployment Laws is to provide benefits to workers who have become unemployed through *no fault* of their own, therefore, the Ohio statute 4141.29(D)(1)(a) is constitutionally defective and in violation of the Supremacy Clause, U.S. Constitution, Article VI, Cl. 2 and the Due Process and Equal Protection Clause, U.S. Constitution, 14th Amendment. Appellants presented the following arguments to the District Court.

(1) Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect by subsidizing the union members.

(2) Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions.

(3) The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund.

(Answer Brief of Defendants, p. 12)

The three judge court held that

"Defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits."
(Appendix p.10)

Defendants-appellants contend that nearly all states have a labor dispute disqualification in one form or another. Some States deny benefits absolutely to strikers, some States deny benefits until a certain number of weeks have expired, and others have similar statutes to Ohio's that deny benefits not only to those actually out on strike but to those who are laid off because a strike exists at a functionally integrated facility which causes the entire plant to shut down—either from lack of parts, supplies in the form of raw materials or fuel as in the instant case. North Carolina's statute, which is identical to Ohio's was upheld by this court in *Abernathy* v. *Eastern Airlines,* 259 N.C. 190, 130 S.E. 2d 292 (1963) cert. denied, U.S. Sup. Ct. 375 U.S. 161 (1963). This court decided a similar but not identical labor dispute case in 1963 wherein the reasonableness of a labor dispute disqualification was upheld when benefits were denied to many Alaskan fishermen who became unemployed through no fault of their own due to a labor dispute in San Francisco which delayed the fishing boats to such an extent that it was too late into the season to send the fleet out from Alaska. *Unemployment Compensation Commission of Territory of Alaska* v. *Aragan,* 392 U.S. 143, 67 S. Ct. 245 (1946) rehearing denied 329 U.S. 834, 67 S. Ct. 627 (1947).

Ohio law treats all labor disputes equally. No distinction is made between an entire plant that is forced to close down due to a strike in one of the departments of the company or where one of its separate facilities is on strike causing the entire plant to shut down. In either case, benefits would be denied. In reality, there is little practical difference between the two situations. When a department, for example, consisting of workers in the plumbers and steamfitters union engage in a labor dispute and go out on strike which in turn forces the employer to close the plant, it is entirely possible that the other

unions in the plant such as the electrical workers, sheetmetal workers, carpenters, assembly workers, etc., may not be in sympathy nor even benefitting or participating in the strike—yet they are denied benefits. It even may be that not all the members of the union on strike wish to be unemployed, yet they are ineligible for benefits. The second argument presented by the defendant/appellants below was that granting of benefits to workers unemployed due to a labor dispute would place the employer in an unfair negotiating posture. The economic advantage would go to the union who could limit and preserve its strike funds whereas the employer would be faced with settling at any cost or face the burden of increased tax rates in addition to the loss of income for the duration of the strike while his fixed overhead, taxes and expenses continue to accrue. The increased tax rate could go on for many years, long after the strike has been forgotten by the union and the workers.

The third argument, which is of primary concern to the State of Ohio and the Ohio Bureau of Employment Services, charged by statute to administer the unemployment compensation program is the preservation of the state fund. This court held in *Geduldig* v. *Aiello*, 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1947) that the preservation of the state fund and the interest in distributing available resources in such a way as to not unduly burden the contributors was a legitimate interest "so long as the line drawn by the State is rationally supportable" and the "courts will not impose their judgment as to appropriate stopping point for state social welfare programs".

Equally important to the instant case is the rationale contained in *Dandridge* v. *Williams*, 397 U.S. 471, 486-487, 90 S. Ct. 1153, 1162, 25 L. Ed. 491 which was cited by the Honorable Justice Stewart and contained in the Syllabus, paragraph 2 of the *Geduldig* case, *supra*.

> "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all".

Appellant's Answer Brief, p. 11 cited cases wherein this rationale was upheld by various courts from the year 1898 to the present time. A state's interest in preserving the fiscal integrity of its fund by restricting the eligibility of a class is within the power of the legislature provided it does not conflict with some federal standard. (See also transcript, p. 11).

The State of Ohio, the Ohio Bureau of Employment Services and the employers are not the only parties interested in preserving the fiscal integrity of the fund and concerned with the increasing economic burden being placed on employers by increasing the tax rates in order to maintain the unemployment insurance program.

In the Hearing before The Committee on Finance, United States Senate, Ninety-fourth Congress, first session on H.R. 6900, June 10, 1975 (U.S. Government Printing Office No. 53-821-0, 1975) the tables and statistical material on page 119 entitled "Unemployment Benefits Paid—or Projected To Be Paid" (Current Law) based upon June 1, 1975 unemployment assumptions shows that in 1973 $4.2 billion was paid out in benefits. In 1975 this figure rose to $18.3 billion, an increase of approximately $14 billion dollars. Table 10—Advances to States from the Federal Unemployment Account, page 118 shows that from 1972 through May 15, 1975 eight states had to borrow from the federal unemployment account in the amount of 608.4 million dollars because their state compensation funds were exhausted. The Department of Labor statistics as of October 15, 1976 show that thirteen additional states have had to borrow from the federal loan fund. (U.S. Senate Finance Committee—Staff Report on Unemployment Insurance Amounts of 1976, dated August 15, 1976 and U.I. Trust Fund Summary Quarterly Report—Published by Bureau of Accounts, U.S. Treasury, Division of Government Finance Operations, Report No. BA-R-1114). Twenty-one states have borrowed $3,208,032,294 from the federal compensation fund,

which in turn, due to the federal loan fund becoming insolvent, had to turn to the federal general revenue fund (Taxpayers' monies) for advances in the amount of $2.9 billion. As a result of the heavy drain on unemployment funds, the Federal Unemployment Account as of October 15, 1976 had only $321.4 million in reserve—only $83,513,168 over the amount Ohio has in its own trust account. The breakdown of loans to the states are as follows:

Alabama	$ 30,000,000
Arkansas	20,000,000
Connecticut	355,145,380
Delaware	14,500,000
District of Col.	29,600,000
Hawaii	22,500,000
Illinois	429,400,500
Maine	14,900,000
Maryland	36,159,000
Massachusetts	265,000,000
Michigan	571,000,000
Minnesota	123,000,000
Montana	1,366,089
Nevada	7,600,000
New Jersey	497,202,000
Oregon	18,450,000
Pennsylvania	464,734,825
Puerto Rico	57,000,000
Rhode Island	65,500,000
Vermont	35,272,000
Washington	149,400,000
Total	$3,208,032,294

Ohio's fund, although still financially in the black, had a balance of $237,886,832 as of September 30, 1976. The Fund has dropped from a high of $775,199,878 on December 31, 1974. From December 31, 1971 until December 31, 1974, Ohio

maintained a reserve balance of over $600 million per year to meet the needs of unemployed workers who were entitled to benefits under our state laws. Today, Ohio is faced with the possibility of a financial crisis, perhaps joining the ranks of the other twenty-one sister states who had to borrow from the federal government to maintain its unemployment program if economic conditions remain poor.

States that borrow from the federal compensation fund are required to repay those amounts within two years. If not repaid, the employers' tax rate of 3.8% is increased in 0.3% increments per year as a penalty. For instance in 1976 it would be 0.3%, 1977 the rate would be 0.6%, in 1978 the rate would be 0.9% and so forth. This is in addition to the 0.5 percent which goes into the states mutualized account.

The concern for this additional burden placed upon the employer is evidenced by the following discussions that occurred on June 10, 1975 in the Hearing-Committee on Finance, United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, U.S. Government Printing Office, Washington, D.C. No. 53-821-0 (1975). Chairman of the Committee on Finance, Russel B. Long:

> "Mr. Secretary, eight states have exhausted their unemployment benefit accounts and are now borrowing money from the Federal Unemployment account to meet their benefit obligations. These are interest free loans, but if they are not repaid within 2 years, the Federal unemployment tax on employers in the State, in effect, is automatically increased in order to increase the amount. Senator Ribicoff's bill, S. 1502, now pending before the committee, would allow an additional 3 years for these loans to be repaid. Could you give us your view on this proposal?"
>
> Secretary Dunlop:
>
> "Well Senator, you are perfectly right of the fact of these States and others that will in the future exhaust their funds

and be required to borrow. We, I think, are concerned about the impact of these tax penalties on employers in the States where economic conditions are already causing heavy burdens".

Hearing—Committee on Finance—United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, page 56.

Plaintiffs-appellees contend that the Federal Government has preempted the field on Unemployment Compensation reducing the States' participation to that of a mere ministerial function.

Senator Floyd K. Haskell asked the following question to Secretary Dunlop:

"What role does your office or your agency play in determining whether or not a Federal Fund is actuarily sound; whether in fact the law is collecting adequate money to fund potential unemployment benefits?"

Secretary Dunlop deferred to Mr. Lawrence E. Weatherford, Jr., Associate Manpower Administrator in the Department of Labor because the question was in his area of responsibility. Mr. Weatherford responded:

"Senator, there are really two areas that we have. The first one is one where the State has the full responsibility, and there is no strict Federal requirements that would impose on the State a tax rate, the amounts, and the solvency of that fund.

The second area is one that we do actively participate in. It is one where we provide technical assistance to our actuaries to each State in developing appropriate tax schedules and estimating income, outgo, and trying to provide that technical assistance that a State needs. *We have got to provide a great amount of influence over it by program letters, leadership, guidance, to make sure that the State does develop a program that is sound.* In this regard we have a lot of work to do . . . *because over half of our states' trust funds are going to be in serious difficulty*".

Hearing—Committee on Finance, U.S. Senate, Ninety-Fourth Congress, First Session on H.R. 6900, June 10, 1975, page 42.

During the Hearings before the Committee on Finance, United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, June 10, 1975, testimony of the various members of Congress and committee members themselves clearly indicate that the federal government is gravely concerned over (1) the solvency of the fund, (2) the continued extended funding will develop into an income maintenance system, (3) the danger of too much funding by the federal government in extended benefits after claimants exhaust their state benefits will lead to a gradual take-over of the unemployment programs by the Federal Government; (4) the increasing burden that is being placed upon the taxpayer who ultimately has to bear the burden of the costs and (5) the Federal Government determining who is to be covered and what amount of benefits will be paid. The following testimony is offered in support of the above statements:

Senator Robert Dole, Kansas, member of the Committee on Finance, speaking in support of H.R. 6900 stated:

"I might preface my remarks by stating that I voted for the Amendment on the Tax Reduction Bill to provide an additional 13 weeks' benefits through the end of this month. I did so with reservations, however, in that I am concerned over the possibility that this may become more than an "interim" action.

I say that because our record of turning supposedly temporary programs into permanently established policy is not very encouraging . . . Certainly, these times of excessive unemployment call for responsible relief measures by Congress. But at the same time, we need to *guard against*

the possible evolution of a protracted income maintenance system—which could conceivably end up being subsidized itself out of general revenues". (emphasis added). Hearings, *supra* pp. 1, 2.

That statement by Senator Dole on June 10, 1975 was at a time when the Federal Loan fund contained 3.8 billion dollars. On October 15, 1976 the Federal Loan Fund, after borrowing 2.9 billion dollars from the taxpayers out of general revenue funds, to help states with depleted trust funds, had a balance of 321.4 million dollars.

The purpose of the unemployment insurance program is to pay benefits to those workers who have lost their jobs, due to economic conditions, and to help finance them while they are actively seeking new employment in the open job market. *Actively seeking employment* is a *condition* in nearly all the states as a condition precedent to receiving benefits. Senator Russell B. Long, Chairman of the Committee on Finance succinctly stated the purpose of unemployment programs.

"Mr. Secretary, the *theory of unemployment benefits is that they provide income on a temporary basis to the worker who has become involuntarily unemployed; and he can then find a suitable job.* He is *allowed 26* weeks to *find a new job* under the regular unemployment program; 39 weeks when unemployment is high; either nationally or in his state . . . At what point do you feel we should cease to consider a man's unemployment a purely transitional problem and do something to create jobs, rather than just provide cash income to people who are not working?" (emphasis added)

The Honorable John T. Dunlop, Secretary of Labor replied:

"Mr. Chairman, I think that is a good question, and that is the range of issues I referred to a little while ago by

suggesting that at some point the UI system runs the danger of doing what the British did in the 1930's, of turning it into a sort of welfare system" . . . I do think that it is appropriate that the duration should rise in times of very heavy unemployment. And the reason for that principle, I think is this. The job search which takes place in a labor market may take a lot longer, and one may have to travel a lot further in times in which unemployment levels are appreciably higher . . . I, myself, am concerned and at the outset this morning, Mr. Byrd, expressed *concern about our system degenerating—instead of a Federal-State system,* instead of an employer tax supported system—*degenerating into* what I call a *public assistance program.* And I used the experience of the British in the 1930's because that is the classic case in which it went awry. And I am concerned about that."
Hearings before the Committee on Finance, United States Senate, Ninety-Fourth Congress, First Session on H.R. 6900, June 10, 1975 at pages 34 and 38.

In response to Senator Harry F. Byrd, Jr.'s question:

"Is the system policed adequately to determine that those who have not been placed in jobs at the end of, say 52 weeks have *really sought jobs*?" Hearings, *supra,* at 39.

Secretary Dunlop stated:

". . . First, I will confess that it is extremely difficult, conscientiously, perhaps, to administer that in a time in which jobs are very scarce, because the ultimate test of availability is sending a person out to a job to see whether he will accept it or not and for what reasons. And this is the best test. . . . *Now, each of the states,* as you know, *has its own rules about this matter,* and *what is an appropriate availability for work concept in one state is not applied in another; they have their own.* What wage will a man or woman have to accept? How far will they have to travel?

Shall they or shall they not work on the night shift in order to accept a job? How far different from the kind of work that they have normally done shall they be allowed to refuse and still draw unemployment compensation? These are very difficult problems, I confess, and as I say, an enormous body of precedent and law and court decisions, as a matter of fact, in all of these States, has grown up over that matter."

Hearings, *supra*, page 39, 40.

Senator Floyd K. Haskell, committee member asked this question to Secretary Dunlop of the Labor Department:

"Mr. Secretary, the bill on which we are holding this hearing would extend unemployment benefits from 40 to 65 weeks, and this means, I assume, additional employer taxes. *I wonder at what point is the employer going to stop being burdened and at what time, will this be a general fund responsibility*? (emphasis added).
Hearings, *supra*, p. 40

Secretary of Labor Dunlop responded as follows:

". . . Although we have not come down on any position about the issue you raised, the advisory council, the Federal Unemployment Insurance Advisory Council, has come down on this side of saying after 39 weeks the matter ought to become a Federal Government responsibility. (General Revenue funds).

On the other hand, I have some *reservations* about too early in the duration *transferring the responsibility to the Federal Government exclusively*, partly because that *further undermines* the *state-federal system, which I think*, in this area, speaking personally, *I would like to see preserved.* If the Federal Government pays a larger and larger share of that bill, it seems to me the case for the *federalization* of the *system*, which has become a very emotional issue in

many parts of the country and among many of the *employers* in the country, becomes a little easier; *and the arguments for Federal determination, not only of benefit standards* but of *duration*, and *each* and *all* the *gory details*, including the administration of these matters I was talking with Senator Byrd about, become much more possible and much more difficult to resist. I do not, myself, think that, on the whole, is a desirable development. So, I am not, myself, too enthusiastic about that, apart from its fiscal and obvious budgetary factors." (emphasis added)

Hearing—Committee on Finance, pages 40, 41.

The Payment of Unemployment Insurance Benefits To Those Unemployed Due To A Labor Dispute Would Constitute An Unlawful Entry Into An Area Preempted By The Federal Government.

Although the chief concern of the Ohio Legislature was to maintain an equilibrium between insured risks of unemployment on the one hand and the necessary level of contributions from employers on the other hand, thus protecting the fund, there has been for 40 years, in addition to the other arguments above, the further justification of "state neutrality" in labor disputes. It has long been the policy of the State of Ohio to remain neutral in labor disputes. It might well be feared that the state's ability to impose conditions upon claimants seeking unemployment benefits such as "actively seeking work" and "able and available for work" would exercise an influence upon the conduct of members of organized labor. (Sec. 4141.29 Ohio Revised Code, Appendix p. 26). It has been further feared that the payment of unemployment insurance benefits to those unemployed due to a labor dispute would have an adverse effect upon an employer's bargaining posture by forcing the employer to subsidize a strike against himself or by giving strikers the psychological reinforcement of knowing that their co-workers in sister unions of the same employer will not

suffer. This latter consideration is supported on further policy grounds when one considers the possibility and probability of collusion between unions co-existing at the same functionally integrated establishment.

In the case of *Hawaiian Telephone Co.* v. *State of Hawaii Department of Labor and Industrial Relations*, Civil No. 74-140 (1975), the United States District Court, District of Hawaii held that the payment of unemployment insurance benefits to strikers by the state constituted a wrongful entry into the field of labor relations preempted by the National Labor Relations Act. The Hawaii Federal District Court continued to state that it was axiomatic that state laws may not interfere with employee activities protected or prohibited by Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. Sections 157-58 and that under the Supremacy Clause state laws that conflict with federal legislation are invalid. (See *Garner* v. *Teamsters Local No. 776*, 346 U.S. 485, 490-91 (1953)); *San Diego Building Trades* v. *Garmon*, 359 U.S. 236 (1959), *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). The U.S. District Court of Hawaii then struck down the Hawaiian practice of paying benefits to strikers. Certainly if the policy of "state neutrality" is strong enough to warrant the negation of a state policy, it ought to be at least sufficient to provide a rational nexus or reasonable basis for supporting a state law.

B. The Ohio System of Unemployment Compensation is not in Conflict with the Federal Social Security Act.

The three judge district court below in its memorandum opinion (pages 1, 8 Appendix) found a relationship to exist between the Federal Social Security laws and the Unemployment Insurance Laws of the State of Ohio and presumed the existence of a federal right to unemployment compensation protected by 42 U.S.C. 1983 and the 14th Amendment. The court below erred because the Ohio labor dispute disqualification does not contravene any Federal substantive right found in the Federal Social Security laws.

The Plaintiff below, appellee here, successfully argued that *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 91 S. Ct. 1347 (1971), a case interpreting 42 U.S.C. 303 and 503, created a substantive right to unemployment when employees are "unemployed through no fault of their own" and they further argued that this constituted the basis of a 42 U.S.C. 1983 action. Contrary to the position argued by the plaintiff below, and accepted by the Three Judge District Court, the Social Security Act 42 U.S.C. 303 and 501, 503 creates no such substantive federal right. Rather 42 U.S.C. 303 and 501, 503 give rise to *procedural* rights, none of which are in issue in the instant case, while the substantive aspects are wholly state law.

All federal-state cooperative unemployment insurance programs are financed in part by grants from the United States pursuant to the Social Security Act, 42 U.S.C. 501-503. No grant may be made to a State for a fiscal year unless the Secretary of Labor certifies the amount to be paid, 42 U.S.C. Section 502(a). The Secretary of Labor may not certify payment of Federal funds unless he first finds that the State's program conforms to federal requirements. In particular, Section 303(a)(1) of the Social Security Act requires that *state* methods of administration be found "to be reasonably calculated to insure full payment of unemployment compensation when due." Neither 42 U.S.C. 303, 42 U.S.C. 503, nor any case law thereunder mandate any substantive eligibility or disqualification requirements; rather, they address only the procedural aspects of administering a joint federal state program based on *state* substantive law.

The provisions which the states must include in their laws to obtain funds for administration are contained in Sec. 303(a) of the Social Security Act. They are as follows:

(1) The law must provide for methods of administration which are found by the Secretary to be reasonably calculated to insure full payment of unemployment

compensation when due. This provision also requires that the state agencies establish and maintain a personnel system based on merit, but prohibits the Secretary of Labor from exercising any authority with respect to the selection tenure of office, and compensation of any individual employed by a state agency.

(2) Unemployment benefits must be paid solely through public employment offices or such other agencies as the Secretary may approve.

(3) Individuals whose claims for unemployment compensation have been denied must be given the opportunity for a fair hearing before an impartial tribunal.

(4) All money received in the state fund, immediately upon its receipt, must be deposited with the Secretary of the Treasury to the credit of the federal unemployment trust fund. This provision does not apply to refunds of sums erroneously paid into the state fund or refunds paid in accordance with IRC Section 3305(b).

(5) All funds withdrawn from the federal unemployment trust fund must be used by the state for the payment of unemployment compensation benefits, exclusive of expenses for administration, and for refunds of sums erroneously paid into the state fund or refunds paid in accordance with IRC Sec. 3305(b). This provision stipulates, however, that contributions by employees may be used to pay disability benefits. In addition, there is an exception where a state, pursuant to a specific appropriation made by the legislature, withdraws money for the payment of expenses incurred by it for the administration of its unemployment compensation law and public employment offices, as provided for in Sec. 903(c)(2) of the Social Security Act.

(6) The state is required to make such reports in the form and containing the information required by the Secretary of Labor, and the states must comply with the provisions the Secretary finds necessary to assure the correctness and verification of such reports.

(7) The state must make available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, including a statement of the recipient's rights to further compensation under the law.

(8) All funds received pursuant to Sec. 302 of the Social Security Act for the proper and efficient administration of the state's unemployment compensation law must be used solely for that purpose.

(9) Any funds received pursuant to Sec. 302 of the Social Security Act which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary for the proper administration of the state law must be replaced within a reasonable time.

In *Ruth Fenoff* v. *State of Vermont, Department of Employment Security and Mrs. Madelyn Davison, Commissioner*, 1974 1A CCH Unemployment Insurance 3999-140 (paragraphs 21, 437) hereinafter cited as *Fenoff* and in *Ocie Nevills* v. *State of Illinois*, 388 F. Supp. 62 (D.C. Ill. 1974), hereinafter cited as *Nevills*, the district courts of two different states both agreed that 42 U.S.C. 303, 501-503 addressed only procedural and *not* substantive federally secured rights. In *Fenoff, supra*, a three judge district court ruled that the state unemployment insurance laws of Vermont which provided a blanket disqualification

from receiving unemployment compensation benefits during the first week of unemployment was not in conflict with 42 U.S.C. 503 as that statute was interpreted in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 91 S. Ct. 1347 (1971). The three judge district court in *Fenoff* said that the "payment when due" language was applicable only in determining when such benefits as a *state* may decide to pay must be paid and that this provision was not applicable in determining the substantive laws surrounding unemployment compensation benefits disqualifications. In *Ocie Nevills* v. *State of Illinois, supra*, the U.S. District Court for the Eastern District of Illinois addressed a factual situation similar to that in *Fenoff, supra*. In *Nevills*, the court dismissed the Plaintiff's action stating that although the state's unemployment compensation program was a joint federal-state cooperative effort financed in part by grants from the federal government pursuant to the Social Security Act 42 U.S.C. 501, the federal law left the states free to adopt their own eligibility requirements and disqualification provisions.

These cases are in accord with a line of authority developed by this court in 1937. Up until the time that this Court decided the case of *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 57 S. Ct. 868 (1937), hereinafter cited as *Carmichael*, the right of the state to impose any system of disqualification was unchallenged. In *Carmichael, supra*, the Unemployment Insurance Laws of the state of Alabama were challenged on the ground that the various classifications imposed therein infringed the due process and equal protection clauses of the Fourteenth Amendment, and were further challenged on the ground that they were an unconstitutional surrender to the national government of the sovereign power of the state. This court held those challenges to be unfounded and invalid. At 301 U.S. 495, 519 this court upheld the right of the state of Alabama to adopt its own system of disqualifications from receiving unemployment compensation benefits saying: "In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt (citations omitted), or where it is most practicable to deal with it (citations omitted). It may exclude others whose need is less (citations omitted), or whose effective aid is attended by inconvenience which is greater (citations omitted)."

It is significant to note that the Alabama Unemployment Insurance Law, challenged as unconstitutional in *Carmichael, supra*, contained a "Labor dispute disqualification" which was subsequently used to disqualify claimants under facts not unlike those in the instant case (See Alabama Board of Appeals Decisions Nos. 2230-2242, March 4, 1950).

At page 526 of the *Carmichael* case, *supra*, this court addressed the relationship between the State Unemployment Compensation Laws and the Federal Social Security Act and concluded that there was no conflict. This court stated that:

> "... The unemployment compensation fund is administered in accordance with state law by the state commission. The statute may be repealed at the will of the legislature, and in that case will be free to withdraw at any time its unexpended share of the Unemployment Trust Fund from the treasury of the United States, and to use it for any public purpose" ...

Similarly in *Chas. C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937), hereinafter cited as *Steward*, this court in an opinion by Mr. Justice Cardozo reaffirmed the position taken in *Carmichael* that Unemployment Compensation is wholly a matter of State law. At page 301 U.S. 548, 594 and 596 of *Steward, supra*, this court stated that the only federal aspect of state unemployment dealt with the allowance of a tax credit, and that the utilization of this federal credit created no more a federal interest in the state program than would the deposit of state monies in a national bank.

Although the federal government could attempt to create federal rights to receive unemployment compensation benefits on facts like those in the instant case, it has chosen not to do so. As early as 1935 President Roosevelt professed that so long as state systems of unemployment compensation conformed to the conditions precedent to receiving federal funding or tax credits, the administration of the unemployment insurance funds and the determination of eligibility of claimants should be left in the hands of state executive and judicial instrumentalities (H.R. Doc. No. 81, 74th Cong., 1st Session VI (1935)). As recently as 1969 the United States Congress has rejected proposals that would have enabled the Federal Government to dictate disqualification provisions. Chairman Mills stated that this was an area left to the states and that they should be "given the latitude to enable them to write the type of program that they want" (115 Cong. Rec. 34106, 1969). The Preface to the "Comparison of State Unemployment Insurance Laws" U.S. Department of Labor (1972), V.C. Hodgson, Secretary, begins by saying at page iii:

> "In the Federal-State system of unemployment insurance established in this country under the Social Security Act, the individual states have been free to develop the particular program that seems best adapted to conditions prevailing within the state. Consequently, no two State laws are alike".

It is the position of this Appellant that the State of Ohio in enacting and enforcing Section 4141.29(D)(1)(a) Revised Code as in effect in 1974 acted pursuant to its rights as a sovereign state as guaranteed by the Tenth Amendment of the U.S. Constitution. It is this Appellant's further belief that in enacting this statute the State of Ohio could not have violated any provision of 42 U.S.C. 303, 501-503 because this federal act creates no federal substantive right. It is further contended that in the absence of such federal right no 42 U.S.C. 1983 action can be maintained, and the court below erred in finding for the

Plaintiff below. *Ortega* v. *Ragen*, 216 F. 2d 561 (CA 7, 1954), *Street* v. *Surdyka*, 492 F. 2d 368 (CA 4, 1974), *Saffiote* v. *Catherwood*, 305 F. Supp. 989, affirmed 417 F. 2d 971 (CA 2) (1969). It has long been recognized that state systems of unemployment compensation create no federal substantive right in spite of the nature of the joint federal-state program. In *Eldred* v. *Division of Employment and Security, Department of Social Security*, 295 N.W. 412 (1940) the Supreme Court of Minnesota in disposing of a constitutional challenge to various classifications of that law's coverage stated at page 414:

> ". . . Upon what basis, then, can it be said that plaintiff, under the circumstances here disclosed, has any right to question, upon a constitutional basis the classification made by the amendment? *He is possessed of no vested rights* adversely affected by the amendment, since what the legislature has given it can take away, at least as to all benefits not already accrued when the amendment became effective. In any event, the burden is on plaintiff to show that the act has adversely affected *some substantial rights belonging to him which is protected by the constitution.* Unless he does so he is not in position to challenge its validity" . . . (emphasis added).

In the instant case an examination of the claim of the plaintiff below, Appellee here will reveal that he has established no federal right to unemployment insurance coverage and is merely displeased with what he perceives to be the underinclusiveness of the Ohio law. An alleged violation of rights which stem solely from a relationship of a citizen to his state or a right derived solely from state law is not protected by the Federal Constitution or the federal statutes. *Gentry* v. *Howard*, 288 F. Supp. 495 (N.D. Tenn., 1968).

C. A State System of Unemployment Compensation May Predicate Disqualification from Receiving Benefits Upon Any Reasonable Basis.

The plaintiff and the three judge district court both erroneously contended that the disqualification from receiving unemployment insurance benefits can be predicated only upon "fault". (See Memorandum Opinion and Order, Appendix p. 10).

As previously stated, Unemployment Compensation although social legislation, is less like a "welfare program" and more like an "insurance policy" under which benefits are paid when a risk that has been insured against comes to fruition. In *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495 (1937) this court examined both the extent of coverage and nature of disqualifying factors involved in Alabama's Unemployment Insurance program. At page 518, 519, 520, this court recognized that a state system of unemployment insurance need not reward the needy and ignore the guilty but rather a state could predicate disqualification on any reasonable basis. This discretion is necessary because economic and employment conditions vary from jurisdiction to jurisdiction and according to geography.

In *Matter of Heitzenrater*, 19 N.Y. 2d 1 (1966) at page 7 Judge Fuld in discussing whether a labor dispute disqualification should be based on "fault" said that "fault" is not a "meaningful concept" when applied to the labor dispute disqualification because it tends to vest in the officials of an unemployment system, the power to decide questions of labor relations better left to Federal and State arbitrators. To say that "fault" is the sole disqualifying factor would require that whole sections of the Ohio law be ignored. Under the Ohio system of unemployment insurance entire industries are not afforded coverage such as school teachers out of work over lengthy school vacations, commissioned salesmen, independent contractors, and agricultural workers.

In terms of actual disqualifying factors, the State of Ohio under 4141.29 (Appendix p. 26) has chosen to "disqualify" from receiving unemployment benefits a number of classes that are not fault related. Among these classes are those persons who are not "actively seeking" work and those individuals who are not "available" for work. Under these provisions full time students have been disqualified as well as hospitalized workers who are not "available" for work; yet, none of these classes involve "fault" as that term is commonly defined.

There is, in the Ohio Unemployment Insurance program, much overlap between classes of disqualified workers. Some workers fall under more than one disqualification. In the instant case the labor dispute disqualification was utilized; however, in the absence of this states might utilize other disqualifications such as "availability for work" or "actively seeking work". As mentioned elsewhere in this brief, the Unemployment Insurance system requires "unemployment". Although there are exceptions, unemployment contemplates a situation in which an employee is severed from his employment and thus is free to "actively seek" work elsewhere and make himself "available" for such work. A strike and unemployment due to a labor dispute are outside the scope of this contemplation because the workers involved have not really severed their employment contracts. They might not have time to look for work or might be contractually prohibited from using the skills that they learned from their last employer, in the service of a new employer, and thus would be disqualified for "refusing suitable work". Clearly, there is no blackletter formula for disqualification, rather, there are conditions and circumstances which the State legislature has elected not to compensate or has elected to categorize under one broad topic instead of under several unwieldy ones.

There is one more important concern to the State of Ohio and the Bureau regarding the potential liability on its trust funds. There is now pending before the Court of Appeals,

Eleventh Appellate District, Trumbull County, Warren, Ohio *Achey* v. *General Motors Corp., et al.*, Case No. 2355, which has been stayed pending the decision of this court in the instant action. This case involves thousands of employees who were laid off by General Motors in Lordstown, Ohio under the same disqualifying statute and circumstances as in this case. (transcript p. 52). Counsel for plaintiff-appellee have another class action suit against the Ohio Bureau in the United States District Court for the Northern District of Ohio, Eastern Division, Youngstown, Ohio in Civil Action No. 76-139Y.

In addition, plaintiff-appellees' counsel indicated that by "discovery and further evidentiary hearings establish other class members" who have been denied benefits in previous years as a result of the same disqualification as being litigated herein. (transcript p. 52, line 16, 17, and 18). Opposing counsel attempted to have the District Court hold the matter for determination in order to determine the identity of other classes affected in the past by the application of Section 4141.29(D)(1)(a), Ohio Revised Code (transcript p. 53, line 24 and 25, p. 54, line 1). The judges held a conference and did not reply to opposing counsel's request. (transcript, p. 54, line 2 and 3).

The Bureau is greatly concerned that an adverse ruling in this case would have a domino effect completely devastating the trust fund.

D. The Decision of the Court Below Denied U.S. Steel and Republic Steel Their Due Process Rights under the Fifth and Fourteenth Amendments.

It was the understanding of both parties in the Court below that the issue before the Three Judge District Court concerned the propriety of class certification, the adequacy of notice to the class members, and the necessity for a three judge district court. When the court proceeded to decide not only those matters but also the merits of the case, the employers, U.S. Steel and

Republic Steel were denied an opportunity to appear and present evidence bearing upon the economic effect of paying benefits (See *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974)). The employers in this case stand to lose substantial sums of money over the next few years if their account is charged as directed by the district court.

The records in this case place the number of claimants at 1,250 which was ascertained by the actual number of claimants that appealed to the Ohio Board of Review. U.S. Steel records indicate that the actual number of workers laid off were 1,402 and Republic Steel records indicate 1,294 workers were laid off. Until the administrative determinations are concluded, the actual number of claimants that would be eligible for benefits if the Ohio statute is struck down can not be determined, however, the potential liability is of great concern, both to the employer whose tax rate will increase, and the Bureau where the funds will have to be depleted. The formula for calculating the amount of monies involved are:

8 weeks (duration of the strike) x $100.00
(average weekly benefits amount) x 2,696 claimants.

The total amount of benefits could be in the sum of $2,156,800.00.

Unlike other forms of social legislation, Ohio's system of Unemployment Compensation is not funded from the General Revenue nor does it depend upon employee contributions; rather, it is funded *in toto* by the *employer*. The amount that each employer must annually contribute is calculated based upon his "experience rating". The "experience rating" refers to the relationship existing between the "positive" or "negative" balance in an employer's account with the state, compared to the number and amount of the charges against it when viewed over a period of time as set by state statute.

When there are charges against an employer's account because of the payment of unemployment benefits to his

employees, the balance in the employer's account necessarily decreases. When this balance drops below a certain sum, the employer's tax rate for the next ensuing year is increased to offset the deficit. By being denied an opportunity to intervene, U.S. Steel and Republic Steel are being deprived not only of their favorable experience rating, which is part of the goodwill assets of their business, but of the money that will be required in future years to recoup their lost level of positive balance.

The involvement of the Three Judge District Court constitutes a denial of substantive due process in that there is no procedure by which a Federal Court may engage in the legislative function of establishing tax rates. Each specific unemployment tax rate classification used in connection with experience ratings is determined by the state legislature based upon the contemplated scope of the state's Unemployment insurance coverage. Each rate contemplates a certain level of statutory disqualification. The judicial elimination of a disqualification disturbs this balance and necessitates a higher tax in order to pay the benefits available under the judicially broadened statute. Not only does this usurp the function of the State legislature but it frustrates the operation of a statutory program by creating, in essence, common law unemployment insurance coverage in an area in which it had neither been contemplated nor provision made for its financing. The increased operating costs thus created would be tantamount to a judicially ordered increase in taxation, which violates the statutory mandate that the tax be established by the legislature. The District Court's decision thus attempts to do what even the Federal Social Security Administration has not chosen to do, in that it attempts not only to determine who will receive unemployment benefits, but at which rate the employer will be taxed. This is in violation of the Tenth Amendment of the United States Constitution.

Further, this is an area in which the court should not attempt to substitute its judgment for the judgment of the

legislature. Debatable questions in respect to the reasonableness of legislation enacted pursuant to the state police power are not for the court but for the legislature. (See *Sproles* v. *Benford*, 286 U.S. 374, 52 S. Ct. 581 (1932)).

E. The Decision of the Three Judge District Court is in Conflict with the Decisions of Other Jurisdictions and Against the Weight of Law and Authority.

In *Chas. C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937) and in *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 57 St. Ct. 868 (1937) this court examined the constitutionality of the Unemployment Insurance laws of the state of Alabama and found them to be constitutional. In *Carmichael, supra*, this court examined the types of restrictions that a state might impose upon the payment of unemployment insurance benefits and found them to be constitutional. Included in the law there under examination was a labor dispute disqualification. At page 520 of *Steward, supra*, this court surmised that the basis of a classification concerning the payment or non-payment or unemployment benefits will be deemed reasonable and its constitutionality sustained if any state of facts could be reasonably conceived which would support its selection. In the instant case the three judge district court ignored this doctrine and instead stated that although the State of Ohio had shown several bases upon which a finding of reasonableness might be predicated, namely; the desire of the State to remain neutral in labor disputes and the desire to protect the fund against depletion, the three judge district court held that these bases were insufficient. In so doing the three judge district court below not only ignored caselaw precedent but imposed an impermissibly high burden upon the State of Ohio.

Although it is the position of the Appellant that there is no "federal right" involved in this case and thus no basis for a 42 U.S.C. 1983 action, it must be noted that even if some federal

right does exist, the burden upon the State of Ohio would at most require the showing of a "rational nexus" or "reasonable basis" upon which the classification may be related to an exercise of the state's power.

The information and cases cited herein indicate that the lower court erred in asking for more than was demonstrated by the State of Ohio. The plaintiff below did not allege or prove the existence of any "fundamental constitutional right" such as would be necessary in order to require the State of Ohio to show a "compelling state interest" in maintaining its interpretation of Section 4141.29(D)(1)(a) Ohio Revised Code. Although it may appear harsh to draw the disqualifying line at the point chosen by the State of Ohio, it was within the power of the state to do so and it is not within the province of this court to substitute its feelings and judgment for that of the Ohio legislature. In *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974) at 416 U.S. 1, 8 this court stated that in analyzing economic and social legislation it is for the legislature, and not the courts, to draw the lines of distinction between classes of persons so long as those lines are reasonable.

This court has already upheld the "reasonableness" of a labor dispute disqualification although on somewhat different grounds. In *Unemployment Compensation Commission of Territory of Alaska* v. *Aragan*, 329 U.S. 143, 67 S. Ct. 245 (1946) rehearing denied 329 U.S. 834, 67 S. Ct. 627 (1947) this court upheld a labor dispute disqualification on facts somewhat similar, but not identical to, the facts in the instant case. In that case the Alaska Unemployment Compensation Commission had denied the payment of benefits to a number of Alaska claimants because they had become unemployed due to a "labor dispute" which had arisen in San Francisco, California. In that case a failure on the part of some of the Alaska Canning unions to arrive at a settlement fatally delayed the beginning of operations in a "seasonal industry". The claimants argued that it was not a labor dispute, but the passage of time in this seasonal industry that had led to the workers' unemployment.

These unemployed workers in turn challenged the reasonableness of the application of Alaska's labor dispute disqualification. This court at 329 U.S. 143, 154, 155 ruled that this application of the labor dispute disqualification was a reasonable exercise of state authority. In so stating, this court merely reaffirmed its previous position as stated in *Carmichael, supra*, to the effect that a state system of unemployment insurance need not occupy the entire field or no part of it. In *New York Central Railroad Company* v. *White*, 243 U.S. 188 (1917) this court addressed the analogous area of Workmen's Compensation holding that the exclusion of various classes from coverage under the program worked no constitutional deprivation. Lower courts have upheld both the application of the labor dispute disqualification as then in effect in Ohio and the policy bases asserted in support of it. A representative sampling of these cases must include *Spielmann* v. *Industrial Commission*, 236 Wis. 240, 295 N.W. 1 (1940) in which the Supreme Court of Wisconsin held that an employee who had been employed in an automobile manufacturer's body plant in Milwaukee was not entitled to benefits under the Wisconsin Unemployment Compensation Act where the employee was out of work because of a shutdown caused by a strike at a sister plant. The Wisconsin court found the operations of the two plants to be so closely alligned as to make them functionally one operation. Similarly, in the instant case the function of the Steel Company owned coal mines as sole energy source for the steel companies makes them functionally one operation. In *Chrysler Corp.* v. *Smith*, 297 Mich. 438, 298 N.W. 87 (1941) the Supreme Court of Michigan ruled that where a labor dispute at a main plant caused the suspension of operation of other plants, employees of those other plants could not receive unemployment insurance benefits. The court in that case noted that the Michigan law disqualified workers who were unemployed due to a labor dispute and continued to state that the reasons for this were to preserve the neutrality of the State and to preserve the unemployment compensation trust fund. The court further noted that the state was in effect the "trustee" of a "trust fund" comprised of unemployment compensation monies

and that these funds could only be disbursed in accordance with the terms of the "trust". Similarly in *Abernathy* v. *Eastern Air Lines*, 259 N.C. 190, 130 S.E. 2d 292 cert. denied 375 U.S. 161, 84 S. Ct. 241 (1963) and in *Cornell* v. *Bailey*, 163 Ohio St. 50, 25 N.E. 2d 323 (1955) the Supreme Courts of North Carolina and Ohio upheld the application of the labor disqualification in situation involving separate but functionally integrated operations.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decision of the three judge district court or, in the alternative that this Honorable Court reverse the decision of the three judge district court and remand this action for further evidentiary hearings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, *et al.*,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLEE

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FOR ARGUMENT

IN THE

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OCTOBER TERM, 1976

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE AND ERRATA IN CORRECTION
OF APPELLEE'S BRIEF IN CHIEF

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SUPPLEMENTAL BRIEF OF APPELLEE AND ERRATA FOR CORRECTION
OF APPELLEE'S BRIEF IN CHIEF

Appellee, pursuant to Rule 41(5) of the Rules of the Supreme Court of the United States, respectfully submits the following late authority which was not available in time for inclusion in the Brief of Appellee in this case.

(A) Discussion of Kistler v. Industrial Comm'n.

Subsequent to the filing of appellee's brief in chief on this appeal, appellee's counsel became aware of the decision of the Supreme Court of Colorado in Kistler v. Industrial Comm'n, _____ Colo. _____, 556 P.2d 895 (1976), decided November 29, 1976, first published in the January 7, 1977 issue of the Pacific Reporter, and not available to counsel for appellee at the time of the filing of the Brief of Appellee. The Supreme Court of Colorado in the Kistler case, for the third time in less than four years (see Spann v. Industrial Comm'n., 181 Colo. 153, 508 P.2d 385 (1973), Brief of Appellee, p. 22; Sylvara v. Industrial Comm'n., _____ Colo. _____, 550 P.2d 868 (1976), Brief of Appellee, pp. 22, 52), struck down a disqualification from receipt of benefits under the unemployment compensation law of that state on the ground that the provision violated the Fourteenth Amendment to the Constitution of the United States.

The statute in issue in Kistler disqualified an individual, who voluntarily left employment because of marital or other domestic obligations, from receipt of unemployment compensation benefits unless the individual subsequently worked for at least 13 weeks in new employment. The thirteen-week requirement was not imposed upon individuals who voluntarily left employment for no reason at all, although other penalties were imposed. The Court found that the classification lacked a rational basis, and therefore violated the Equal Protection Clause of the Fourteenth Amendment. Surely, if this discrimination between individuals whose unemployment was voluntary is invidious in the constitutional sense, the discrimination in the instant case between appellee and his fellow steelworker, and other involuntarily unemployed individuals is clearly invidious.

(B) Errata in correction of Brief of Appellee

Appellee respectfully submits the following errata in correction of his brief in chief:

1. Page 29: Fifteenth line of text--change "benefit" before "of" to "bereft"

2. Page 35: Sixth line under heading 4.a.--change "volutary" before "character" to "voluntary"

3. Page 42: Eighth line of first full paragraph--change "Appellee" before "has" to "Appellant"

4. Page 45: Twenty-fifth line of text--change "of" at end of line to "an"

5. Page 48: Seventh line of text--change "it" before "not" to "is"

6. Page 55: Fourteenth line of text--insert after "(1972)" at beginning of line ", appeal dismissed, sua sponte, by Supreme Court of Ohio on ground no substantial constitutional involved, motion to certify record overruled by Supreme Court of Ohio, Jan. 12, 1973, Case No. 72-786, Vol. XLVI Ohio Bar No. 4, pp. 83-84, 87"

7. Page 56: Fifth line of first full paragraph--change "to" before "opinion" to "the"

8. Page 59: Eighteenth line of first full paragraph--change "ans" before "was" to "and"

9. Page 60: Fourteenth line of text--change "neigher" at beginning of line to "neither"

Respectfully submitted,

T. PATRICK LORDEON
on behalf of

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, *et al.*,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The facts which formed the basis of the proceedings and decision below are adequately and concisely set forth in the Findings of Fact in the opinion of the District Court below. (*Hodory v. Ohio Bur. of Emp. Services*, 408 F. Supp. (N.D. Ohio E.D. 1976)), and appellee adopts those Findings (408 F. Supp. 1018) as accurately reflecting the factual context in which the legal issues presented in this appeal must be determined.

Appellee does not take exception with the Statement of the Case presented in the Brief of the Appellant insofar as it is in conformity with the findings of the District Court. However, appellee deems it necessary to correct certain inaccuracies in the Statement of the Appellant.

The appellant misleads the Court wherein he states that Section 4141.29(D)(1)(a) of the Ohio Revised Code contains "essentially the same language as the original statute enacted in 1936." (Brief of the Appellant at p. 2.) The text of the 1936 labor dispute disqualification limited the denial of unemployment benefits to those individuals who lost their employment because of a strike "in the establishment *in which [they were] employed.*" (See, e.g., Brief of Republic Steel Corporation as *amicus curiae* at p. 8; also discussed below at Part C.) The 1963 amendment broadened the definition of establishment to include "any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed. . .".

Appellant's reassertion of the posture of the proceeding below, insofar as it tends to convey the impression that the District Court decided the case on substantive constitutional issues not briefed or argued, strains credulity. It cannot be determined how appellant arrived at the summarized six issues at p. 5 of his brief, however, the equal protection and due process issues were raised in the Complaint and were briefed and argued by both parties in the Court below.

Although no evidence was presented by the appellant, it cannot be said that the appellant was denied such opportunity. Appellant interposed no objection prior to or during the hearing below. Appellant did not seek to introduce any evidence in the District Court, nor did he request, by motion following the judgment, leave to introduce any evidence.

SUMMARY OF THE ARGUMENT

The State of Ohio has disqualified appellee and a class of necessitous, unemployed workers from receiving unemployment benefits due to a labor dispute involving their employers. The labor dispute consisted of a nationwide strike by the United Mine Workers affecting mines owned by the employers of appellee and his fellow steelworkers. Said steelworkers were employed in steel-making facilities and were in no way participating in, financing or directly interested in the labor dispute.

The foundation for the federal-state system of administration of unemployment compensation is the Social Security Act. Although certain latitude is allowed the states in their methods of administration, such methods must be reasonably and properly designed so as to be in harmony with the purpose of the Act. The well-articulated purpose of the unemployment compensation program is to provide a substitute for wages during a period of total or partial unemployment, to workers unemployed through no fault of their own. It follows that the denial of unemployment benefits to appellee and others similarly situated was in fatal conflict with the controlling federal purpose.

The only class of *involuntarily* unemployed workers ineligible for benefits under Ohio's disqualification provisions (contained in Section 4141.29 of the Ohio Revised Code) prior to December 1, 1975, were those individuals who fell within the labor dispute disqualification found in O.R.C. Sec. 4141.29(D)(1)(a). The various other classifications of disqualified individuals contained in O.R.C. Sec. 4141.29 involve some element of fault on the part of the individual claiming benefits. The labor dispute disqualification which mandates the denial of unemployment benefits to a class of individuals who through no fault of their own were

laid-off because of a labor dispute occurring in facilities owned or operated by their employers, is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The statute in question also violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. While the State of Ohio, pursuant to its police power, concededly has broad latitude in enacting legislation, its legislation must be reasonable and must bear a real and substantial relation to a legitimate state purpose. Also, its legislation must not, in order to be constitutional, create a conclusive presumption which is not universally true in fact. The Ohio statute under consideration as it relates to appellee does not bear a real and substantial relation to the statute's legitimate purposes; furthermore, said statute creates a conclusive presumption, which, as demonstrated by the facts of the present case, is not universally true in fact. Therefore, said statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Finally, U.S. Steel Corporation and Republic Steel Corporation, the employers of appellee and other class members, suffered no deprivation of constitutional rights. First, the question of whether these corporations should have been party litigants in the proceeding before the three judge court was never properly presented to the lower court, either by the appellant or by said companies. Secondly, no authority supports the appellant's assertions that: (a) the two steel companies were denied their substantive and procedural due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution; (b) and that the lower court's decision is violative of the Tenth Amendment to the U.S. Constitution. Next, U.S. Steel and Republic Steel were not indispensable parties to this litigation

because they were not necessary parties under Rule 19(a) of the Fed. R. Civ. P., and being a necessary party is one prerequisite in order to qualify as an indispensable party under Rule 19(b) of the Fed. R. Civ. P. Furthermore, assuming that these two corporations have some interest in the present case, that interest has been vigorously represented by the appellant; moreover these companies, by filing briefs as *amici curiae*, have themselves protected whatever interest they have inasmuch as their arguments relative to the merits of the case are before this Court.

A.

THE OHIO SYSTEM OF UNEMPLOYMENT COMPENSATION, INSOFAR AS IT REQUIRES DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO PERSONS UNEMPLOYED BY REASON OF LABOR DISPUTE, WHERE SUCH PERSONS ARE NOT PARTICIPATING IN, FINANCING, OR DIRECTLY INTERESTED IN THE DISPUTE, IS IN FATAL CONFLICT WITH CONTROLLING FEDERAL LAW.

Although the appellant is in error asserting the Court below decided this cause favorably to the Plaintiff on statutory, rather than constitutional, grounds, it is nevertheless appropriate that appellee set forth the statutory argument in support of the judgment of the District Court. The statutory issue was raised and argued by the appellee in the Court below and the appellee urges its consideration herein in support of affirmance. *Fusari v. Steinberg*, 419, U.S. 379, 387, 42 L. Ed.2d 521, 528 (1975). This alternative argument is advanced, therefore, in recognition of this Court's

tradition that disposition of cases should, if possible, be on statutory rather than constitutional grounds. *e.g.*, *Harmon v. Brucker*, 355 U.S. 579, 581 (1958).

The Ohio unemployment compensation system is governed by, and financed in part under, the provisions of the Federal Social Security Act (42 U.S.C. Sec. 501 *et. seq.*) as well as the Federal Unemployment Tax Act (26 U.S.C. Sec. 3301 *et. seq.*). Section 302(a) of the Social Security Act provides, in pertinent part:

> The Secretary of Labor shall from time to time certify to the Secretary of the Treasury for payment to each State *which has an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act*, such amounts as the Secretary of Labor determines to be necessary for proper and efficient administration of such law . . . (Emphasis Added) (42) U.S.C. 502 (a)).

Section 303(a)(1) of that Act further requires that the State law be approved by the Secretary of Labor under the Federal Unemployment Tax Act and that methods adopted by the state systems be reasonably calculated to insure full payment of unemployment compensation when due (42 U.S.C. Sec. 503(a)(1)).

In the absence of a purpose clause relative to the aforementioned Social Security and Federal Unemployment Tax Act legislation, the intent of Congress in establishing a system of unemployment compensation can be determined by reference to the legislative history. *Accord, Welsh v. United States*, 398 U.S. 333, 347 (1970) (Harlan, J., Concurring). The purpose of Congress in enacting the unemployment compensation program was to provide a substitute for wages lost during a period of unemployment *not the fault of the employee*. Report of Committee on Economic Security, Hearings on S. 1130 before Senate Committee on

Finance, 74th Cong., 1st Sess., 1328 (1935). This clear federal purpose was also enunciated in the proposed draft bills for state legislatures adopted by the Federal Social Security Board, which provided that the purpose of unemployment compensation legislation was to provide benefits to persons *unemployed through no fault of their own.* See U.S. Social Security Bd., Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types (Rev. Ed. 1937), quoted in the *Purposes and Provisions of the "Labor Dispute" Disqualification from Unemployment Compensation*, 56 Northwestern U.S. Rev. 662, 663 (1961); see also, *Effect of Participation in Labor Dispute upon Continuation of Unemployment Benefits*, 56 Cornell L.Q. 738, 749 (1967). The draft bills were widely used by state legislatures in adopting their own unemployment systems and the "no fault" concept, as it pertained to labor dispute disqualifications, was almost universally adopted (See detailed discussion *infra* at Part C). As observed by the lower court, Ohio's own statutory disqualification section (O.R.C. Sec. 4141.29) indicates "that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment. *Hodory v. Ohio Bureau of Employment Services*, 408 F. Supp. 1016 (1976).

Involuntary unemployment has been more recently articulated as the evil sought to be cured by the system of unemployment benefits. Prior to passage of the "Employment Security Amendments of 1970," Act of August 10, 1971, Pub. L. No. 91-373, the United States Senate Finance Committee declared as follows:

> The committee believes that the disqualification provisions of State unemployment compensation laws should be devised so as to prevent benefit payments to those responsible for their own

> unemployment, without undermining *the basic objective of the unemployment insurance system—to provide an income floor to those whose unemployment is beyond their control . . . Severe disqualifications . . . are not in harmony with the basic purposes of an unemployment insurance system.* S. Report No. 91-752, 91st Cong. 2d Sess., 24 (1970) (Emphasis added).

In its analysis, by section of the "Employment Security Amendments of 1970," the House Ways and Means Committee reported with respect to amended 26 U.S.C. Sec. 3304(a)(10) that the requirement (restated in its entirety below).

> . . . would not prevent a State from specifying the conditions for disqualification such as, for refusing suitable work, for voluntary quitting, for unemployment *due to labor dispute—in the worker's plant*, etc. H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 19 (1969). (Emphasis supplied.)

Although the House Committee Report expresses an opinion that the States may disqualify "for unemployment due to a labor dispute in the worker's plant," the tacit inference which may be drawn from the statement is that no disqualification should be imposed wherein the labor dispute exists outside the worker's plant.

This Court, in a unanimous, landmark decision in the area of unemployment compensation law, declared a state unemployment compensation statute invalid as being in conflict with Section 303(a)(1) of the Social Security Act in *California Department of Human Resources Dev. v. Java*, 402 U.S. 121 (1971). Chief Justice Burger, in delivering the opinion of the Court in *Java*, clearly indicated that the purpose of Congress in enacting the unemployment compensation program was to provide a substitute for wages lost during a period of unemployment *not the fault of the employee* (402 U.S.

130). It follows, accordingly, that a state statute which operates to deny unemployment compensation benefits to otherwise eligible persons who are involuntarily unemployed without fault of their own, is in constitutionally fatal conflict with the controlling federal statutory scheme, unless it can be somehow harmonized with federally sanctioned purposes.

Appellant argues that Congress intended to create "procedural" rights in the unemployed, leaving the "substantive aspects" of eligibility or disqualification wholly within the states' province (Appellant's Brief at pp. 24-31). Appellant further attempts to distinguish *Java, supra*, on the basis that *Java* merely creates procedural, rather than substantive, rights. The attempt to characterize this issue as merely substantive-procedural is deceptively misleading. There is no authority supporting such a principle. The citations at p. 27 of Appellant's Brief of *Fenoff v. Vermont*, Civil No. 73-264 (D. Vt., Sept. 26, 1974), 1A CCH Unempl. Ins. Rep., para. 21, 437 (1974) and *Nevills v. Illinois*, 388 F. Supp. 622 (1974) as directly supportive of the position that 42 U.S.C. Sec. 501 *et seq.* "addressed only procedural and *not* substantive federally secured rights" are wholly inappropriate. Neither the *Fenoff* nor *Nevills* opinion articulates any such procedural-substantive dichotomy. Rather, in dismissing claims attacking a one-week waiting period for the payment of unemployment benefits, the Courts held that the purpose of the Social Security Act as determined by this Court in *Java* (*supra* at 131) was to give partial as opposed to total replacement of wages to the unemployed. The significant import of *Java*, as well as *Fenoff* and *Nevills*, lies in their consideration and use of the purposes of the federal unemployment laws in determining whether unemployment claimants' rights have been subverted by state laws inconsistent with Congressional intent.

Another argument urged by the appellant is that the federal unemployment legislation creates no federal substantive rights. As early as 1935, the Federal Unemployment Tax Act (26 U.S.C. Sec. 3301 *et seq.*), companion legislation to the Social Security Act (42 U.S.C. Sec. 501 *et seq.*), required, in order that each state law receive the approval of the Secretary of Labor, that:

> (5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (A) if the prosition offered is vacant due directly to a strike, lockout, or other labor dispute;
> (B) if the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
> (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization. 26 U.S.C. Sec. 3304(a)(5)

Subsection (5) of 26 U.S.C. Sec. 3304(a) represented one of six requirements for federal approval of state laws. Although Subsection (5) was the only requirement dealing directly with standards of eligibility, it is evident that Congress provided substantively that no state could force an unemployment claimant to accept certain kinds of employment in order to maintain his eligibility.

Since 1935, moreover, there have been two recent amendments to 26 U.S.C. Sec. 3304, both of which bear upon eligibility standards. The "Employment Security Amendments of 1970," Act of Aug. 10, 1970,

Pub. L. No. 91-373, added seven new requirements for approval of state laws (26 U.S.C. Sec. 3304(a)(7)-(13)). Among these seven requirements, the following bear directly upon eligibility standards:

> (8) Compensation shall not be denied to an individual for any week because he is in training with approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work);
>
> (9)(A) Compensation shall not be denied or reduced to an individual solely because he files a claim in another State . . . or because he resides in another State . . . at the time he files a claim for unemployment compensation; . . .
>
> (10) Compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with work, fraud in connection with a claim for compensation, or receipt of disqualifying income; . . .
>
> (12) Each political subdivision of the State shall have the right to elect to have compensation payable to employees thereof . . . 26 U.S.C. Sec. 3304(a).

Additionally, the "Unemployment Compensation Amendments of 1976," in increasing the number of requirements for approval of state laws from 13 to 16, by substituted second subsection (12), requires, effective January 1, 1978, that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy." Act of Oct. 20, 1976, Pub. L. No. 94-566 Sec. 312(a), amending 26 U.S.C. Sec. 3304(a)(12).

The above requirements for approval of state laws are but a small segment of recent federal amendments affecting the systems of unemployment compensation. Persistent, high levels of unemployment during the last several years have brought about a significant congressional response. Enactments include the "Employment Security Amendments of 1970," Act of Aug. 10, 1970, Pub. L. No. 91-373; "Emergency Unemployment Compensation Act of 1971," Act of Dec. 29, 1971, Pub. L. No. 92-224; "Emergency Unemployment Compensation Act of 1974," Act of Dec. 31, 1974, Pub. L. No. 93-572; and "Unemployment Compensation Amendments of 1976," Act of Oct. 20, 1976, Pub. L. No. 94-566. The 1970 Amendments significantly broadened the definition of "employer," reducing the number of individuals employed from four to one (26 U.S.C. Sec. 3306(a)); increased the amount of wages subject to the Federal unemployment tax from $3,000 to $4,200 (increased to $6,000 effective January 1, 1978 per 1976 Amendments) (26 U.S.C. 3306(b)); expanded coverage to certain individuals in the employ of a state wherein, hospitals or institutions of higher education may elect to provide coverage for their workers (26 U.S.C. Sec. 3309(a)); and, established a federal-state extended unemployment compensation program whereby benefit periods of eligibility could be extended by as many as 13 weeks (26 U.S.C. Sec. 3304(a)(11)). The Acts of 1971 and 1974 provide for an extension of the "emergency benefits" initiated in the Act of 1970 and increase from 13 to 26 weeks the maximum extended benefits which may be paid. Title II of the "Emergency Jobs and Unemployment Assistance Act of 1974," Act of Dec. 31, 1974, Pub. L. No. 93-567 established a federal program of assistance to those workers not otherwise eligible for unemployment assistance under state law. The "Unemployment

Compensation Amendments of 1976" mandate that the state laws include, effective January 1, 1978, coverage for certain farmworkers, most state and local government employees, individuals employed by elementary and secondary school systems and certain domestic workers.

The comprehensive federal legislation described above is illustrative of congressional intent to pre-empt the state, particularly with respect to the scope of inclusiveness in the unemployment program. Such would certainly tend to weaken the argument advanced by appellant and *amici curiae* (*e.g.*, Brief of Appellant at pp. 28-31 and Brief for the Chamber of Commerce as *amicus curiae*, p. 12) that the powers of the states are unimpaired in the area of the scope of coverages. This is not to suggest that there is any validity to such an argument since, obviously, the powers of the states are controlled by an overriding federal purpose. *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896).

That unemployment without fault on the part of the claimant was the social evil Congress sought to remedy can be gleaned from the appellant's brief wherein he states, quoting Senator Russell Long: "the *theory of unemployment benefits is that they provide income on a temporary basis to the worker who has become involuntarily unemployed . . .*" (Appellant's Brief, at p. 20) (Emphasis supplied by the appellant!) Moreover, the Brief for the Chamber of Commerce as *amicus curiae*, though filed in support of the appellant, nevertheless states that "there may exist equitable grounds" to distinguish between strikers and workers laid off due to a strike, admitting, therefore, that "equities" exist to treat these non-strikers differently than strikers and to permit states to grant these

non-strikers unemployment benefits. (Brief for the Chamber, at pp. 12-13) The "equities" discussed by the Chamber of Commerce which "permit" states to grant benefits to those idled by a labor dispute lie at the very heart of the congressional purpose for unemployment compensation. The states which have accepted this "equitable permission" now total 49 (See discussion *infra*, at Part C). Appellee would suggest, moreover, that the "equity which permits" the payment of benefits to those who are involuntarily unemployed is really the congressional purpose of unemployment compensation which mandates the payment.

The labor dispute disqualification imposed on workers laid off because of strikes in which they had no involvement has been successfully attacked as a contravention of legislative intent in at least two states. The Alabama labor dispute disqualification has been interpreted as to not deny benefits to an employee who becomes involuntarily unemployed by reason of a labor dispute in which he was in no way involved, and which he, his agents or organization were powerless to prevent. The Alabama court interpreted the statute in light of the general legislative purpose of providing benefits to persons who become unemployed involuntarily (*Department of Industrial Relations v. Drummond*, 30 Ala. App. 78, 1 So.2d 395, 398 (1940); *cert. den.* by Alabama Supreme Court, 241 Ala. 142, 1 So.2d 402 (1940); see also *Ex Parte McCleney*, 286 Ala. 288, 239 So.2d 311, 314 (1970)). The Supreme Court of Delaware, relying on the legislative purpose of providing benefits to persons unemployed without fault of their own, has held the labor dispute disqualification in that state applicable only to individuals who are participating in the dispute, with even a direct interest in the outcome of the dispute being insufficient to disqualify (*Lowe Bros., Inc. v. Unemp. Ins. App. Bd.*,

332 A.2d 150, 153 (Del. 1975)). In both of the above situations, neither state statute contained any of the so-called escape clauses. Moreover, although neither statute was as onerous in its terms as the Ohio disqualification, they were nevertheless determined to be violative of legislative intent.

The purpose of a labor dispute disqualification from receipt of unemployment compensation benefits has been discussed in a number of legal periodical articles. The justification of such legislation is generally based on two grounds. The first of these is that an employee involved in a labor dispute is not involuntarily unemployed, and denial of benefits under such circumstances is required to fulfill the basic purposes of limiting payment of benefits to those persons unemployed without fault of their own. The second justification or supporting argument is that a labor dispute disqualification is necessary to keep the state "neutral" in labor controversies; as, in the absence of such a disqualification: (1) the state would be financing or subsidizing, and possibly prolonging the dispute, by paying benefits to employees who were involved in the dispute or who had a direct interest in the outcome of the dispute; and (2) the state would be compelling the employer, whose contributions finance the compensation system, to subsidize the parties opposing him in a labor dispute. (See *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461, 463-464 (1940); *Labor Dispute Disqualification under the Ohio Unemployment Compensation Act*, 10 O.S.L.J. 238, 239-240 (1949); *The Purposes and Provisions of the "Labor Dispute" Disqualification from Unemployment Compensation*, 56 Northwestern U.S. Rev. 662, 663-664 (1961); *Effect of Participation in a Labor Dispute upon Continuation of Unemployment Compensation*, 52 Cornell L.Q. 738, 749-750 (1967).)

Appellant and *amici curiae* argue that the State of Ohio, in disqualifying workers laid off because of a labor dispute, is merely preserving a position of neutrality in labor controversies. The disadvantages of taxation (for the payment of benefits to workers involuntarily unemployed) which are incurred by employers large enough to have separate establishments within, or totally foreign to the industry in which said workers are employed, e.g., multinational, vertically integrated firms such as United States Steel and Republic Steel Corporations, are far outweighed by the very purpose of unemployment compensation. Neutrality cannot be asserted to support industrial aggrandizement. Payment of compensation to individuals who are in no way participating in, financing or directly interested in a labor dispute, can in no sense be reasonably construed as subsidizing parties on one side of the dispute. Such payment, also, can in no sense be reasonably construed as compelling the employer to subsidize the parties who are opposing him in a labor dispute. In fact, Section 4141.29(D)(1)(a), rather than preserving the neutrality of the state in labor disputes, operates to violate the principle of neutrality. Denial of benefits to individuals in no way participating in, financing or directly interested in a labor dispute, would have the effect of influencing the disqualified individuals to take the employer's side in the dispute, since the continuation of the dispute would cause the individuals to *lose* both their regular wages and unemployment compensation benefits, as the result of a controversy from which they would *gain* absolutely nothing. Assertions of legislative purpose need not be taken at face value where, as in this case, an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been the goal of the legislation. (See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 fn. 16 (1975).) In

dealing with a class of necessitous workers claiming the benefits of broadly remedial legislation any ambiguities regarding congressional purpose ought to be resolved with liberality toward those for whom the benefit was created. *Voris v. Eikel*, 346 U.S. 328, 333-334 (1953).

Former Section 4141.29(D)(1)(a), Ohio Revised Code, cannot be harmonized with the recognized purposes of a labor dispute disqualification. The statute on its face requires denial of benefits to any individual unemployed by reason of a labor dispute at premises owned or operated by his employer anywhere in the United States, regardless of whether the individual or persons representing his interest are participating in the dispute. This overbroad disqualification is clearly not required to serve the purpose of limiting benefits to persons who become unemployed without fault of their own. The statute on its face also requires disqualification regardless of whether the disqualified individual or persons representing him are financing or directly interested in the dispute. This overbroad disqualification is clearly not required to keep the state "neutral" in labor controversies. Assuming, *arguendo*, that Section 4141.29(D)(1)(a) was not facially infirm on the ground that it could possibly be applied under appropriate circumstances in conformity with the recognized purposes of a labor dispute disqualification, the facts in this case show that its application to appellee and others similarly situated indisputably failed to conform with those purposes. Appellee and his fellow Ohio steelworkers were denied benefits because of a nationwide strike by the United Mineworkers affecting, in Ohio, U.S. Steel and the Republic Steel Corporation. Appellee, and the others similarly situated, were in no way participating in, financing or directly interested in the dispute which was used by the appellant as justification for denial of unemployment compensation benefits.

The payment of substantial federal funds for the administration of the unemployment program in Ohio, as well as the substantial credits allowed to Ohio employers under the Federal Unemployment Tax Act, mandate compliance with federal requirements. Mr. Justice Douglas, in his concurring opinion in *Rosado v. Wyman*, 397 U.S. 397, 427 (1970) analogizes to the federal-state unemployment system and succinctly states:

> The duty of a State, which receives this federal bounty to comply with the conditions imposed by Congress was averted to by Mr. Justice Cardozo who wrote for the Court in *Steward Machine Co. v. Davis*, 301 U.S. 548, 597-598, sustaining the constitutionality of the Social Security Act: "Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received." As he also said, speaking for the Court in *Helvering v. Davis*, 301 U.S. 619, 645, a companion case to *Steward Machine Co.*: "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."

It is an interesting juxtaposition of *Steward Machine Co.* cited by the appellant and *amici curiae* in support of their position, that its authority should now be urged by the state and employers to support a system of underinclusiveness that was the very subject of the original attack on the federal-state unemployment program. The manifest purpose of the Social Security Act to promote the general welfare by providing unemployment assistance was used by that Court to

sustain the Act. *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-587 (1937).

The above discussion fully demonstrates that Ohio Revised Code, Section 4141.29(D)(1)(a), both on its face, and as applied (a) contravenes the controlling federal purpose of unemployment compensation legislation to provide benefits to persons unemployed without fault of their own, and (2) contravenes the controlling federally-articulated limitation that a labor dispute disqualification is only appropriate where applied to individuals who are in some significant way participating in, financing, or directly interested in the dispute. The suspect statute clearly violates the controlling federal requirement that *proper* methods of administration be adopted by state systems (42 U.S.C. Sec. 503(a); and, that such methods be *reasonably* calculated to insure full payment of unemployment compensation when due (42 U.S.C. Sec. 503(a)(1)).

Consequently, in this case, as in the *Java* case, cited and discussed above, we have a state statute which conflicts with the federal statutory scheme governing unemployment compensation. And, in this case, as in the *Java* case, the state statute is invalid under the Supremacy Clause of the Constitution of the United States.

B.

A DISQUALIFICATION FROM RECEIPT OF UNEMPLOYMENT COMPENSATION BENEFITS IMPOSED BY STATE LAW WHICH BY ITS TERMS OR IN ITS APPLICATION INFRINGES ON THE GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IS NO LESS SUSCEPTIBLE TO JUDICIAL INVALIDATION THAN ANY OTHER CONSTITUTIONALLY INFIRM LEGISLATION.

The appellant and *amici curiae* have offered extensive discussion and citation of legal authority concerning the wide latitude given to states in framing disqualifications under their unemployment compensation laws. Appellee recognizes the existence of some grant of latitude, but, as demonstrated in Part A of this brief, this latitude is circumscribed by limitations imposed under the Supremacy Clause of the Constitution of the United States. This latitude is also clearly circumscribed by the guarantees of equal protection and due process contained in the Fourteenth Amendment to the Constitution of the United States. The decision of the District Court below was by no means novel in striking down, on due process and equal protection grounds, the former Ohio labor dispute disqualification as applied to appellee and others similarly situated. During the period of the past fourteen years, state-imposed disqualifications from receipt of unemployment compensation benefits, in their terms or application, have been found invalid under Fourteenth Amendment equal protection and due process in over a dozen cases, by both state and federal courts.

This Court, only last term and without finding it necessary to grant plenary consideration, struck down the Utah unemployment compensation pregnancy disqualification on the ground that it created an insupportable conclusive presumption in violation of Fourteenth Amendment due process (*Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975)). Over thirteen years ago, this Court found that the South Carolina disqualification for failure to accept suitable work was unconstitutionally applied to a claimant who refused to work on Saturday because of religious scruples, the Court determining that the application of the statute violated claimant's First Amendment right to the free exercise of religion, secure against state action through the Fourteenth Amendment (*Sherbert v. Verner*, 374 U.S. 398 (1963); see also, relying on the *Verner* case, *Lincoln v. True*, 408 F. Supp. 22. (W.D. Ky. 1975), finding the Kentucky disqualification for quitting a job without just cause could not constitutionally be applied to a claimant who terminated her employment for religious reasons. The *underinclusiveness* of the Connecticut unemployment compensation statute designating dependents has been found to infringe upon Fourteenth Amendment equal protection (*Vacarrella v. Fusari*, 365 F. Supp. 1164 (D. Conn. 1973)). Rhode Island's former unemployment compensation statute, which placed a greater burden on female than male claimants in establishing the right to benefit increments based on dependency, was found violative of the Fourteenth Amendment right to equal protection (*Bowen v. Hackett*, 361 F. Supp. 854 (D. R.I. 1973)).

Among the decisions of state courts, the Supreme Court of Colorado most recently determined that the pregnancy disqualification in the unemployment compensation law of that state violated Fourteenth Amendment due process, relying on the *Turner* case,

supra, (*Sylvara v. Industrial Comm'n*, ____ Colo. ____, 550 P.2d 868 (1976)). Previously, the Supreme Court of Washington had invalidated the unemployment compensation pregnancy disqualification of that state on Fourteenth Amendment equal protection grounds (*Hanson v. Hutt*, 83 Wash. 2d 195, 517 P.2d 599 (1974)). The Supreme Court of Colorado struck down, on Fourteenth Amendment equal protection grounds, a provision of the unemployment compensation law of that state concerning the circumstances under which an employee might escape disqualification where he voluntarily leaves one job in order to take a "better job" (*Spann v. Industrial Comm'n*, 181 Colo. 153, 508 P.2d 385 (1973)). The equal protection guarantee of the Fourteenth Amendment also provided the basis for invalidating, in its discriminatory application to women, the disqualification in the California unemployment compensation law relating to leaving one's job because of marital or domestic duties (*Boren v. Calif. Dept. of Emp. Div.*, 59 Cal. App.3d 254, 130 Cal. Rptr. 683 (1976)). In addition to the above generally reported cases, state unemployment compensation disqualification provisions have been ruled unconstitutional in application in the following unofficially reported cases: (*Lasko v. Garnes*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,421 (N.D. Ohio 1973), finding Ohio pregnancy disqualification unconstitutional as applied to women involuntarily discharged because of pregnancy; *Meckler v. Haberfield*, 1B Unempl. Ins. Rep., Ohio–New Matters Para. 8943 (Ohio Com. Pl. 1975), following the *Lasko* case; *Jordan v. Fusari*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,420 (D. Conn. 1973), consent decree enjoining enforcement of former Connecticut pregnancy disqualification as violative of the Fourteenth Amendment, *remanded* for

further consideration of the issue of attorneys' fees, 496 F.2d 646 (2d Cir. 1974); *Stickel v. Mason*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,415 (D. Md. 1973), consent decree enjoining enforcement of Maryland pregnancy disqualification as violative of Fourteenth Amendment).

The type of statute most frequently involved in the above cases is a pregnancy disqualification, which bears striking similarities to the type of disqualification involved in the instant case. The pregnancy disqualifications were clearly designed to reach situations in which benefits should properly be denied under unemployment compensation statutes, and to prevent unemployment compensation from becoming a form of disability insurance for pregnant women. Clearly, a woman who voluntarily leaves her employment because of pregnancy, while quite capable of continuing to work, should not receive benefits on the ground that her unemployment is voluntary. Also, a woman who is discharged by her employer, after her pregnancy reaches a stage which interferes with her ability to perform her job duties, should be denied benefits on the ground that she is not a physically able member of the work force. The vice of these pregnancy disqualifications was that they overreached in their application, and invariably imposed disqualification on women who were ready, willing and able members of the work force. Typical of these situations is where a pregnant woman is discharged by her employer, on the ground of her pregnancy, at a time when she is physically able, and ready and willing to continue work. Similarly, we have the statutes which overreach in their facial provisions, in imposing insupportable conclusive presumptions of inability of pregnant women to work after reaching a certain stage of pregnancy.

Like the pregnancy disqualifications found violative of Fourteenth Amendment due process and equal protection, facially or in application, the former Ohio labor dispute disqualification was designed to cover certain situations in which benefits should properly be denied. There are situations where the neutrality of the state in labor disputes would be violated by payment of benefits, or where payment would tend to prolong the dispute, creating a dangerous risk to the solvency of the unemployment compensation fund. However, the former Ohio statute manifestly overreached in some applications, and operated to disqualify individuals whose eligibility for benefits was otherwise indistinguishable from that of other claimants, and without regard to whether disqualification was required to protect the neutrality of the state or the solvency of the unemployment compensation fund. Just as surely as the pregnancy disqualifications were properly struck down where they overreached permissible state objectives, the court below properly struck down the former Ohio labor dispute disqualification, on equal protection and due process grounds, where it overreached permissible state objectives in its application to appellee and others similarly situated.

Appellant, in support of the constitutionality of the former Ohio statute, offers the general proposition that a state does not violate the equal protection clause because the classifications made by its laws are imperfect, and if the classification has some "reasonable basis", it does not offend the Constitution because it is not made with mathematical nicety or in practice it results in some inequality (Brief of Appellant, p. 11). We do not dispute the general validity of this proposition, but it cannot be read to permit states to adopt crude formulae which equate persons whose situations are manifestly different, while dispensing

unequal treatment to persons whose circumstances are rationally indistinguishable. The word "equal" cannot be stripped from the equal protection clause by any broad proposition of law.

Appellant also urges that a statutory program will survive a constitutional attack if any state of facts can be adduced to provide a "rational basis" for the legislative judgment (Brief of Appellant, p. 11). We again have a generally sound proposition, when applied to determination of the facial constitutionality of legislation. However, if this proposition were literally invoked in deciding all constitutional controversies, no facially constitutional statute could ever be found violative of the Constitution in its application to a particular individual or class of persons affected. An infinite number of states of fact can be adduced to provide a rational basis for South Carolina's disqualification for refusal to accept suitable employment, applied to the claimant in the *Verner* case, *supra*, but the facial validity of that statute provided no arguable barrier to its application to the particular claimant being adjudged unconstitutional by this Court. The District Court below determined that the former Ohio labor dispute disqualification was unconstitutional as applied to appellee and the members of his class (408 F. Supp., at 1022). The fact that application of the statute to strikers, for example, would have a rational basis, did not require that the statute "survive a constitutional attack" as applied to appellee and others similarly situated.

The above discussion demonstrates that disqualifications contained in state unemployment compensation laws are no more immune to proper constitutional attacks than any other form of legislation, and that the decision of the court below did not deviate from any established principles of constitutional adjudication.

C.

THE FORMER OHIO LABOR DISPUTE DISQUALIFICATION, AS APPLIED TO APPELLEE AND OTHERS SIMILARLY SITUATED, VIOLATED THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAWS.

1. The nature of the discrimination imposed by former O.R.C. Sec. 4141.29(D)(1)(a).

The Ohio unemployment compensation laws provide benefits to a broad general class of persons who become unemployed without fault of their own. This broad class is circumscribed by certain excluded employments enumerated in Section 4141.01 of the Revised Code. Exclusions of this nature were extensively discussed by this Court in *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937), and their justification adequately covered in this Court's discussion (301 U.S., at 510-513). (The determination of Congress that many of these exclusions are no longer justified is discussed in Part (A), above in this brief.) Appellee and his fellows, of course, being employees of gigantic steel manufacturing enterprises, were not in any of the excluded categories. No argument can be made that the steel industry is similar to agriculture, shipping, a small family business, an employer of domestic servants, a religious or charitable enterprise, the sovereign government of the United States, or a state and its political subdivisions. All employees in Ohio, other than those in the specifically excluded employments, belong to the general class of beneficiaries entitled to the protection of the unemployment compensation law, provided the additional requirement is met of having worked in employment covered by the unemployment compensation law during at least twenty calendar weeks in a

statutorily defined "base period", and having received a specified minimum amount in earnings (O.R.C., Sec. 4141.01(R)). There has been no dispute in this case that appellee and his fellows met the above requirements, and therefore were within the general class of beneficiaries covered under the Ohio unemployment compensation law.

The right to benefits of individual members of the general class of statutory beneficiaries is principally governed by Section 4141.29 of the Revised Code (App., pp. 26-33). This statute provides that each eligible individual shall receive benefits for loss of remuneration due to total or partial involuntary unemployment, subject to the conditions stipulated in the unemployment compensation law, and the statute then specifies several conditions of qualification and disqualification. The conditions of qualification are contained in divisions (A) through (C) of Section 4141.29, and include the requirement of filing a valid application and claim for benefits (divs. (A)(1) and (A)(2)), registration at an employment office (div. (A)(3)), physical ability to work (div. (A)(4)), availability for, and active seeking of suitable work (div. (A)(4)), inability to obtain suitable work (div. (A)(5)), and the requirement of a one-week waiting period (divs. (B) and (C)). The provisions *disqualifying* otherwise eligible individuals are contained in division (D) of Section 4141.29. Disqualification is imposed (1) where unemployment is due to a labor dispute at any premises owned or operated by the claimant's employer within the State of Ohio or any other state of the United States (div. (D)(1)(a)); (2) where the employee has been given a disciplinary layoff for misconduct in connection with his work (div. (D)(1)(b)); (3) for quitting work without just cause (div. (D)(2)(a)); (4) for discharge for just cause in connection with work (div. (D)(2)(a)); (5)

for refusal without good cause to accept suitable employment (div. (D)(2)(b)); (6) for failure to investigate a referral to suitable work (div. (D)(2)(b)); (7) for quitting work to marry, or because of marital, parental, filial or domestic obligations (div. (D)(2)(c)); (8) where the individual became unemployed because of pregnancy (div. (D)(2)(c)); (9) for making a false statement or the like with the object of obtaining unemployment compensation benefits to which not entitled (div. (D)(2)(d)); (10) where the individual became unemployed by reason of commitment to a penal institution (div. (D)(2)(e)); and (11) where the individual became unemployed due to dishonesty in connection with his work (div. (D)(2)(f)).

Each of the above eleven indentifiable disqualifications is founded on some act or omission of the disqualified individual which bears an implication of fault, with the exception of the labor dispute and the pregnancy disqualifications. For this reason, the latter two disqualifications discriminate between the individuals subjected to them, and all the other beneficiaries under the Ohio unemployment compensation law who are disqualified only for some act or omission bearing an implication of individual fault. The discrimination imposed by the pregnancy disqualification was found to be invidious in the constitutional sense, as applied to women involutarily discharged by their employers, and this application of that statutory provision has been permanently enjoined (*Lasko v. Garnes*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,421 (N.D. Ohio 1973)). The discrimination imposed by the former labor dispute disqualification was likewise found unconstitutional by the District Court below, as applied to appellee and others similarly situated, and that application was permanently enjoined. The correctness of this decision is fully discussed below.

2. The appropriate "equal protection" standard.

Appellee recognizes the evolvement of a "two-tier" approach in the adjudication of equal protection questions, and does not urge that the interests involved in this case subject the state's action to "strict scrutiny". The challenged legislation must be tested under the "rational basis" approach. It must candidly be observed that literal application of the less rigorous standard would make all legislation, not subject to strict scrutiny, immune from equal protection attacks, and effectively remove that clause from the Fourteenth Amendment except where "suspect classifications" or "fundamental rights" are involved. For no legislation could literally be found to be "irrational" unless it were clearly the product of moon-struck madmen, acting in legislative concert while benefit of their senses. This Court has not, without a more probing analysis, literally imposed the rationality test in cases which do not involve suspect classifications or fundamental rights (*Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *cf., Massachusetts Bd. of Retirement v. Murgia*, ____ U.S. ____, 49 L.Ed.2d 520 (1976) (dissenting opinion of Marshall, J., 49 L.Ed.2d, at 527-529). In evaluating the standards of equal protection, in a case not requiring strict scrutiny, Mr. Chief Justice Burger observed in part in *Reed v. Reed, supra*:

> "... The Equal Protection Clause ... does ... deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, and not arbitrary, and must rest on some ground of difference having a fair and substantial relation to

the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' . . ." (404 U.S., at 75-76.)

The legislation challenged in the instant case, as applied to appellee and others similarly situated, clearly failed to meet the above-articulated standards.

3. The history and provisions of labor dispute disqualifications from receipt of unemployment compensation benefits.

The unemployment compensation statutes of all the jurisdictions of the United States have contained "labor dispute" disqualifications since their inception. The most widely-adopted provision is one which disqualifies an individual when his unemployment is due to a labor dispute at the factory, establishment or other premises where he is or was last employed, with a proviso to protect individuals who are not actually, or by reasonable imputation, involved or directly interested in the dispute. These "escape clause" or "innocent bystander" provisions typically permit the individual to escape disqualification if it is shown that neither he, nor any employees of the same grade or class, are participating in, financing, or directly interested in the dispute. (See Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461 (1940), at 461-462 n4.) An employee is considered to be "directly interested" in a dispute within the meaning of these statutes if his wages, hours, or conditions of employment will be affected by the outcome of the dispute. (See generally, *Annese v. Bd. of Rev. of Dept. of Emp. Sec.*, 105 R.I. 32, 249 A.2d 46, 47 (1969); *Graham v. Sanders*, 11 Mich. App. 361, 161 N.W.2d

601, 609 (1968); *Burak v. American Smelting and Refining Co.*, 134 Colo. 255, 302 P.2d 182, 184 (1956); *Martineau v. Director of Div. of Emp. Sec.*, 329 Mass. 44, 106 N.E.2d 420, 424 (1952).) The widely-adopted statutory provision was the one recommended for adoption by the states by the federal Social Security Board at the inception of unemployment compensation law in the United States, and was derived from the law of Great Britain, as amended in 1924. (See Fierst and Spector, *supra*; see, as to the 1924 amendment to the British law, Haggart, *Unemployment Compensation during Labor Disputes*, 37 Neb. L. Rev. 668, 686 (1958).) This typical statute is the present law in forty-three of the fifty-two jurisdictions of the United States, with the variation that thirteen of the forty-three do not disqualify on the ground of financing the dispute (Table 405, columns (8) through (10), App., p. 35). This typical form of legislation was adopted by forty-one of fifty-one jurisdictions of the United States at the earliest stages of unemployment compensation law in this country (Fierst and Spector, *supra*, 49 Yale L.J. 461).

The nine jurisdictions which do not currently have the typical disqualification are Alabama, California, Delaware, Kentucky, New York, North Carolina, Ohio, Utah and Wisconsin. The relevant California statute clearly limits its disqualification to individuals who have *voluntarily left* their employment because of a trade dispute (Cal. Unemp. Ins. Code, Sec. 1262). An individual is disqualified in Utah only where his unemployment is due to a strike involving his grade, class or group of workers at the factory or establishment where he is or was last employed (Utah Code Ann., Sec. 35-4-5(d)). Four jurisdictions, Alabama, Delaware, Kentucky and Wisconsin, have disqualifications which substantially follow the British law as it

existed prior to 1924. The disqualification is imposed only where the dispute is at the factory, establishment or other premises where the individual is or was last employed (Ala: Code of Ala., Tit. 26, Sec. 214(A); Del: Del. Code Ann., Tit. 19, Sec. 3315(4); Ky: K.R.S., Sec. 341.360(1); Wis: W.S.A., Sec. 108.04(10)). The New York statute provides disqualification from benefits for a limited period of seven weeks, but in other respects is substantially similar to the Alabama, Delaware, Kentucky and Wisconsin laws (Consol. Laws of New York, Labor Law, Sec. 592). The Alabama statute, from its earliest days, has been interpreted as not disqualifying an individual who becomes involutarily unemployed by reason of a labor dispute in which he is in no way involved, and which he, his agents, or organization were powerless to prevent. (See *Drummond v. Department of Industrial Relations*, 30 Ala. App. 78, 1 So.2d 395, 398, *cert. denied* 241 Ala. 142, 1 So.2d 402 (1940); see Part (E), below in this brief, for further discussion of Alabama law, and of appellant's thoroughly bewildering view of the law of that state.) The Supreme Court of Delaware has quite recently held that the labor dispute disqualification in that state is applicable only to those participating in the dispute, with even a direct interest in the outcome being insufficient to disqualify (*Lowe Bros., Inc. v. Unemp. Ins. App. Bd.*, 332 A.2d 150, 153 (Del. 1975). The courts of Alabama and Delaware, in reaching their interpretations, both relied on the overriding purpose of unemployment compensation statutes to aid those involuntarily unemployed through no fault of their own.

The Kentucky, New York, and Wisconsin statutes have not been interpreted as exempting individuals who are in no way involved or directly interested in a labor dispute. (A petition for writ of certiorari is pending

before this Court, Case No. 75-1644, for review of a recent interpretation of the New York statute in *Drassenower v. Levine*, 48 A.D.2d 957, 369 N.Y.S.2d 227 (1975), *mot. to dismiss appeal granted*, 38 N.Y.2d 771 (1976).) However, the courts of these three states have rejected imposition of a disqualification where the dispute is at premises distinctly separate from the claimant's place of employment. (See, Ky: *United States Steel Corp. v. Brown*, 441 S.W.2d 205 (Ky, 1969), determining that a coal processing plant and mining operations, ninety miles apart and within the state, did not constitute a single establishme. , *Ford Motor Co. v. Kentucky Unemp. Comp. Comm'n*, 243 S.W.2d 657 (Ky. 1951), holding that automobile assembly plants in Kentucky and assembly plants in Michigan did not constitute the same establishment; New York: *Farina v. General Motors Corp.*, 41 A.D.2d 98, 341 N.Y.S.2d 460 (1973), *mot. for leave to appeal denied, sub. nom. Farina v. Levine*, 32 N.Y.2d 612, 346 N.Y.S.2d 1026 (1973), determining that employees of a particular automobile plant, not on strike, were not disqualified from unemployment compensation benefits when production was curtailed due to a strike at assembly plants operated by their employer at other locations; Wis: *Abendroth v. Dept. of I., L., & H. Rel.*, 69 Wis.2d 736, 233 N.W.2d 343 (1975), determining that airline ground employees laid off at terminals in Madison and Milwaukee, because of a strike of pilots at Minneapolis and Seattle, were not disqualified from receipt of unemployment compensation benefits; *Liberty Trucking v. Department of Industry, etc.*, 57 Wis.2d 331, 204 N.W.2d 457 (1973), holding that trucking terminals in Chicago and in Wisconsin were not one establishment so as to impose disqualification on individuals employed at the Wisconsin terminals; *Schaeffer v. Industrial Comm'n*, 11 Wis.2d 358, 105

N.W.2d 762 (1960), holding pulp producing plant and paper mills, eighty miles apart, did not constitute a single establishment; in the *Abendroth, Liberty Trucking* and *Schaeffer* cases, the Supreme Court of Wisconsin carefully distinguished and severely limited the vitality of its early unemployment compensation decision in *Spielmann v. Industrial Comm'n*, 236 Wis. 240, 295 N.W. 1 (1940).) The pre-1963 Ohio labor dispute disqualification was quite similar to the Kentucky and Wisconsin statutes, but it also was interpreted as non-disqualifying where the dispute was a premises distinctly separate from the place of employment of the claimants for benefits. (See *Abnie v. Ford Motor Co.*, 175 Ohio St. 273, 194 N.E.2d 136 (1963), finding that automobile plants in Ohio and a plant in Michigan were not one establishment.)

The above analysis of labor dispute disqualifications in Great Britain and the United States establishes that disqualification was never imposed, in any of the jurisdictions discussed, where the dispute was at premises distinctly separate from the place of employment of the individual seeking benefits. The analysis also shows that in the overwhelming majority of jurisdictions (Great Britain and forty-seven American jurisdictions), no disqualification is imposed unless there is some actual, or rationally imputable, involvement or interest in the dispute on the part of the individual seeking benefits. It was not until the year 1961, decades after unemployment compensation schemes were first adopted, that legislation was enacted in North Carolina which disqualified an individual regardless of the geographical remoteness of the location of the dispute, and regardless of any arguable actual, or imputable, participation or direct interest in the dispute on the part of the disqualified person (Gen. Stat. N.C., Sec. 96.14(5)). This unprecedented, dubious and drastic

course was then imitated by Ohio with the 1963 enactment of the statute in issue in this case (1963 Ohio Laws, 130:972, 974), with Ohio retreating from this extreme position in 1975. (See O.R.C., Sec. 4141.29(D)(1)(a)(Page's 1975 Supp.); see also the opinion of the District Court below, 408 F.Supp., at 1018.)

4. The former Ohio labor dispute disqualification, as applied to appellee and others similarly situated, was not rationally related to the furtherance of a legitimate state interest.

a. The "neutrality" argument.

Appellee will accept, for purposes of simplification, that the principal state justifications for labor dispute disqualifications are (1) the preservation of state neutrality in labor disputes, (2) protection of the fiscal integrity of unemployment compensation trust funds, and (3) the volutary character of the unemployment of persons participating in a labor dispute. (See, for exposition of these purposes in varying degrees of detail, Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461, 463-464 (1940); Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167, 171-177 (1945); Comment, *Labor Dispute Disqualification under the Ohio Unemployment Compensation Act*, 10 Ohio St. L.J. 238, 239-240 (1949); Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 296-300 (1950); Comment, *The Purposes and Provisions of the Labor Dispute Disqualification from Unemployment Compensation*, 56 Northwestern U. L. Rev. 662, 663-664 (1961); Note, *Effect of Participation in Labor Dispute upon Continuation of Unemployment Benefits*, 52 Cornell L.Q. 738, 749-750

(1967).) We will not pause to discuss the third of the above-stated objectives, since the rationality of its basis is obvious. With regard to the neutrality argument, it should be articulated in more detail. This argument essentially involves avoidance by the state of compelling the employer to subsidize those who are opposing him in a labor dispute, or who would clearly stand to benefit by resolution of the dispute favorably to the participating employees. This subsidization, in addition to its inherent unfairness, would also put the employer at a disadvantage in negotiating a settlement of the dispute.

The labor dispute disqualifications in the form employed in Great Britain since 1924, and in forty-seven of the fifty-two jurisdictions of the United States, by their clear statutory language or through court interpretation, rationally further the state's interest in neutrality. Disqualification in these jurisdictions is not imposed where there is no actual, or reasonably imputable involvement or direct interest in the dispute on the part of the claimant for benefits. Where a disqualification goes beyond these limits, it overreaches the bounds of neutrality, and becomes a punitive sanction exacted at the expense of innocent parties.

> "... Blanket disqualification would affect many whose unemployment was unquestionably involuntary; *it would abandon the state's neutral position and assume a punitive aspect as to employees not involved in the dispute*; it would preclude payment of compensation that in no way could be termed 'strike benefits.'" (Emphasis added.) (Shadur, *Unemployment Benefits and the "Labor Dispute Disqualification*, 17 U. Chi. L. Rev. 294, 324 (1950))

Also a blanket disqualification cannot be termed "neutral" since it tends to deter workers with legitimate

grievances from striking for fear of the suffering which might be imposed on innocent, disinterested fellow employees; and a blanket disqualification tends to punish innocent employees because their fellows had decided to exercise their federally-guaranteed right to engage in collective bargainning. (See Shadur, *supra*, 17 U. Chi. L. Rev., at 297-298.)

With regard to application of the former Ohio labor dispute disqualification being justified in the instant case to prevent subsidization of a labor dispute, the District Court below quite correctly observed:

> "... However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid subsidization of the coal miners' strike. Nor is it logical to conclude that payments of benefits to the *Steelworkers* would have placed U.S. Steel or Republic Steel at an unfair disadvantage in negotiations with the *coal miners' union*...." (408 F.Supp., at 1022. Emphasis by the Court.)

Appellee firmly maintains that a labor dispute disqualification does not rationally further the state interest of neutrality where it reaches beyond the edge of a circle which encompasses those persons who actually, or by necessary imputation, are involved or directly interested in the dispute. The fundamental objective of all unemployment compensation legislation is to protect individuals who become unemployed through no fault of their own. A labor dispute disqualification which reaches individuals involuntarily unemployed without fault of their own, when not serving the interest of state neutrality, discriminates on the basis of criteria wholly unrelated to the purported objectives of the disqualification and the objectives of the unemployment compensation law. It also fails to rest on some ground of difference having some fair and substantial relation to the objectives of unemployment

compensation legislation. For these reasons, such a disqualification cannot pass equal protection muster even when tested by the less stringent "rationality" standard. (See *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).)

Appellee recognizes that the above analysis, beyond the question of the legislation in issue in the instant case, casts serious doubt on the Kentucky, New York and Wisconsin statutes in their application to persons in no way involved or directly interested in a labor dispute. The analysis was naturally intended to cast more than serious doubt as to the validity of the present North Carolina law. Appellee challenges these statutory schemes without trepidation. A statute without an "escape clause", but limited to disputes at the establishment or premises where the individual is or was employed, might have had rational justification in a less complicated era. At the early stages of unemployment compensation law, when establishments were generally smaller and less complex, it might have been argued that there was a very likely community of interest, or a clear possibility of collusion between the indentifiable participants in a labor dispute and purported nonparticipants. However, in modern industrial establishments, the existence of distinctive interests, the growing incidence of several different bargainning agents, and other relevant facts can readily be discerned through recognized evidentiary processes, which would not make it burdensome to determine which persons should be disqualified in the interest of preserving state neutrality. The inappropriateness of a blanket disqualification is so manifest to have been obvious to a law student in discussing the pre-1963 Ohio labor dispute disqualification which was substantially similar to the present Kentucky and Wisconsin statutes.

> "It is submitted that the present statute in Ohio is not in harmony with the vast weight of authority which allows benefits to be paid where the claimant has lost his employment involuntarily and without participation on his part in the dispute involved. It seems inconsistent with the spirit and purpose of unemployment laws in general, which is to protect the diligent worker from the dangers of unforeseeable and enforced unemployment." (Note, 24 Cinn. L. Rev. 401, 404 (1955))

This Court in the instant case, however, need not reach the question as to whether a blanket disqualification is rationally supportable where there is a labor dispute at the place of employment of a claimant for benefits. The former Ohio statute was applied in the instant case to disqualify appellee and his fellow steelworkers where the labor dispute was at distinctly separate and remote premises. As noted above, a blanket disqualification is rationally questionable as applied to wholly noninvolved and disinterested individuals, even where a dispute is at the place of employment of the persons seeking benefits. But, when such a disqualification is extended to clearly noninvolved and disinterested persons because of a dispute at distinctly remote premises, even the slightest thread of rationality is totally severed. Even arguments of possible collusion between the participants in the dispute, and the persons seeking unemployment compensation benefits, become frivolous and fanciful. This type of disqualification is nothing less than disqualification for the sake of disqualification.

The former Ohio statute, not being rationally related to furtherance of the neutrality of the state as applied to appellee and others similarly situated, quite predictably operated to produce inequitable and bizarre results. In the instant case, the steelworkers were laid off because a labor dispute had diminished the supply of

a necessary energy source used in manufacture of steel. Any steelworkers laid off because of the coal mine strike were entitled to unemployment compensation benefits under the former Ohio statute, except those workers whose employers also owned coal mines. It can be seen, then, that the former Ohio statute served to encourage and reward monopolistic acquisition, a questionable policy in the light of federal antitrust laws. The former Ohio statute, though part of a statutory scheme designed to alleviate the evil of involuntary unemployment, actually operated to encourage employers to impose unemployment on their Ohio employees. It is common knowledge that one of the principal employers in this case, United States Steel Corporation, has extensive steel manufacturing facilities in the states of Pennsylvania and Indiana, which border Ohio immediately to the East and to the West. Confronted with the loss of coal supplies, and the knowledge that any furloughed steelworkers in Pennsylvania or Indiana would be eligible for unemployment compensation benefits, the employer's clearly logical choice would have been to lay off its Ohio employees. *It is hardly rational for a state to include in its unemployment compensation laws a provision which would tend to encourage and reward employers for imposing unemployment on workers in that state.*

Appellant and *amici curiae*, in support of their neutrality argument, invoke a "domino theory" that all employees' interests are affected by every labor dispute, more specifically urging that a wage increase for one group of employees will invariably lead to increases for all. The facts of this case offer a perfect illustration of the fallacy of this assertion. Steel manufacturing and coal mining are vastly different activities, involving dissimilar hazards and working conditions, so that any purported relationship between the wage scales in the two industries is purely speculative and fanciful. The

"domino theory" also presupposes that all labor disputes involve economic issues. This completely ignores the fact that labor disputes quite commonly involve working conditions, health and safety issues, job qualifications and other noneconomic questions. It is obvious that questions of this sort will often only affect an identifiable and possibly small group of employees, and be of no interest to other employees, and bring no benefit to them.

Clinging to their last straw in support of the neutrality argument, appellant and *amici* urge that the prospect of being taxed in the future, for payment of benefits to noninvolved and disinterested employees laid off because of a labor dispute, will cause employers to crumble at the negotiating table, and yield to the most outrageous and unseemly demands of organized labor. The invalidity of this argument, and the havoc its acceptance would wreak on the unemployment compensation laws of fifty-one of the fifty-two jurisdictions of the United States, is discussed below in appellee's response to the "preemption" argument.

b. The "fiscal integrity" argument.

Appellee and amici urge that the former Ohio labor dispute disqualification was justified by the need to protect the fiscal integrity of the unemployment compensation fund. The fiscal integrity argument has some logical validity where payment of benefits to involved or interested persons is in issue, since payment might tend to encourage or prolong work stoppages, thereby creating an unacceptable risk of drainage of the unemployment compensation trust fund. There is some credible opinion that the soundness of this actuarial argument is questionable even with regard to payment of benefits to persons involved or directly interested in

a labor dispute. (See Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167, 176-177 (1945).) However, as applied to justify denial of benefits to wholly noninvolved and disinterested individuals, the "fiscal integrity" theory has no support in logic. Payment of benefits in those circumstances would in no way tend to encourage or prolong stoppages of work.

In the absence of any logical correlation between denial of benefits to noninvolved and disinterested employees, and the preservation of the fiscal integrity of unemployment compensation trust funds, the denial can only be justified under this theory by a factual showing that payment of benefits presents a special risk, distinguishable from the risks created by other forms of involuntary unemployment. Appellee has assuredly made no such showing. Using the figures supplied by appellant (Brief of Appellant, p. 16), Amicus Republic Steel Corporation (Amicus Brief of Republic Steel, p. 4), and Amicus United States Steel Corporation (Amicus Brief of U.S. Steel, p. 2), payment of benefits to appellee and others similarly situated would reduce the level of the Ohio unemployment compensation trust fund to something in excess of 237 million dollars. (Amici Republic and U.S. Steel, to their everlasting credit, have not asserted that the payments will drive them into bankruptcy.) With regard to the decision of the District Court below being precedent which might create an unacceptable risk of depletion of the Ohio unemployment compensation fund in the future, the Ohio legislature has clearly determined that such a risk is allowable by its 1975 amendment of the labor dispute disqualification (O.R.C., Sec. 4141.29(D)(1)(a) (Page's 1975 Supp.)).

The only purported factual material submitted in support of the fiscal integrity argument are some figures

concerning certain states borrowing from the federal government because of exhaustion of the unemployment funds in those jurisdictions (Brief of Appellant, pp. 15-16). Appellant, however, offers nothing to demonstrate a relationship between the exhaustion of these funds and the fact that the jurisdictions in question have labor dispute disqualifications less stringent than the former Ohio statute. Indeed, the existence of such a relationship is purely a matter of speculation. We further ask whether appellant has considered that exhaustion of these funds might be attributable to the fact that, over the past few years, this Nation has unfortunately suffered the highest levels, by far, of persistent overall unemployment since the Great Depression.

Appellant places great reliance on the decision of this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970). The *Dandridge* case is clearly distinguishable from the one presently before the Court. *Dandridge* involved a regulation placing a maximum limit on grants to AFDC families, which resulted in a difference in the aid received per capita by larger families. The regulation in *Dandridge* did not *exclude* any eligible families from aid. In clear contrast, the former Ohio statute, without rational justification, completely excluded appellee and others similarly situated from receipt of any unemployment compensation benefits. The *Dandridge* case also involved distribution of *limited* public welfare funds among a myriad of potential recipients. By contrast, an unemployment compensation trust fund is not fixed and limited, but is kept solvent by taxation of employers at a rate determined by their unemployment experience. In this situation, exclusion of a particular group of involuntarily unemployed individuals, who work for an employer subject to the unemployment compensation tax, can only be justified by showing that the payment of benefits would result in excessive and

burdensome taxation of the employer. No such showing has been, or can be made in this case. Where there is no question of subsidization of a labor dispute, the risk of compensating those involuntarily unemployed because of the dispute is indistinguishable from compensating other forms of involuntary unemployment. And, where an indistinguishable risk is selected for exclusion, that exclusion is arbitrary, not rational.

Appellant's reliance on this Court's decision in *Gedulig v. Aiello*, 417 U.S. 484 (1974), is similarly misplaced. *Aiello* involved a state disability compensation system funded by a *uniform fixed premium* paid by deductions from employees' wages. The risk of pregnancy was not covered under the system, but pregnancy is a risk clearly distinguishable from the risks imposed by other forms of disability. In the instant case, we have a system which is funded by an *adjustable premium*, and the exclusion of a risk which is not rationally distinguishable other risks which are compensable under the unemployment compensation system. More informative than *Dandridge* or *Aiello*, in the adjudication of the instant case, is this Court's opinion in *Jimenez v. Weinberger*, 417 U.S. 628 (1974). This Court distinguished *Jimenez* from *Dandridge* by pointing out that no showing had been made in *Jimenez* that the payment of social security benefits to certain classes of illegitimate children would significantly impair the federal Social Security trust fund (417 U.S., at 633). Clearly, in the instant case, appellant has likewise failed to show any danger of impairment of the Ohio unemployment compensation trust fund by payment of benefits to appellee and others similarly situated.

Since the exclusion imposed by the former Ohio labor dispute disqualification, as applied to appellee and others similarly situated, was not rationally required to

protect the fiscal integrity of the unemployment compensation fund, its sole justification is as a form of *per se* tax relief to employers subject to the Ohio unemployment compensation law. While it might be an admirable objective for a state to grant tax relief to employers in order to attract industry and business, this relief cannot arbitrarily be granted in an unemployment compensation scheme. Arbitrary tax relief in an unemployment compensation law would certainly make employers happy, but it is destructive of the entire unemployment compensation system. An unemployment compensation system is designed to shift the burden of hardship created by involuntary unemployment from the employee to his employer, to relieve the employee's suffering, and to prevent to burden of providing for the employee's needs being placed on the general taxpaying public. Any disqualification from benefits tends to defeat these purposes. The employee must then suffer the full burden, or rely on state or federal public assistance, thereby shifting the burden from the employer to the taxpayers of the particular state and of the entire Nation. As distasteful as payment of taxes may be to employers, and to all of us, it has long been recognized that this expense can and will utlimately be absorbed in the prices of employer charges to consumers for his goods or services. (See *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 524-525 (1937).)

c. The "preemption" argument.

Appellant expressly (Brief of Appellant, p. 23), and *amici curiae* by implication, urge that denial of unemployment compensation benefits to wholly non-involved and disinterested individuals laid off due to a

labor dispute is necessary to avoid impairment, through state action, of the strength of employers at the bargainning table, and to thereby avoid intrusion into the area of national labor policy preempted by the federal government. This argument, while having some slight surface appeal, conceals its insidious implications. Beneath the surface, it presents the broad and bold assertion that payment of benefits under any circumstances to any individual unemployed because of a labor dispute at any premises owned or operated by his employer at any location, *violates the Supremacy Clause of the Constitution of the United States*. The appropriateness of payment of benefits to noninvolved and disinterested individuals, even where the dispute is at their place of employment, has been recognized for decades in Great Britain and the overwhelming majority of the jurisdictions of the United States. Even among the five (out of fifty-two) minority American jurisdictions, benefits will be paid in four of them where the dispute is at a location distinctly separate from the place of employment of the claimants for benefits. (See discussion under (3) above in this Part of this brief.) Acceptance of the argument of appellant and *amici curiae* would, on supremacy grounds, invalidate the labor dispute disqualifications in fifty-one of the fifty-two jurisdictions of the United States. In exchange for this overall, massive destruction of unemployment compensation statutes, one state scheme will be permitted to survive, that of North Carolina. Appellant is in fact attacking even the validity of the current Ohio law, and the Ohio law as it existed prior to 1963. This is the essence of the choice offered the Court by appellant in its zeal to justify Ohio's twelve-year ignoble experiment, and by *amici* in their zealous pursuit of the greatest possible tax relief for employers, at the expense of imposing suffering on their employees and shifting

tax burdens to the general public. The development of federal labor law and unemployment compensation law have essentially been parallel and contemporaneous. The consideration by Congress of British law in adopting the American system, the form of labor dispute disqualification recommended for state adoption by the federal Social Security Board at the earliest stages of American unemployment compensation law (see discussion under (3) above in this Part of this brief), and the silence of Congress for four decades with the presumed knowledge that only two American jurisdictions have ever attempted to deny unemployment compensation benefits to noninvolved and disinterested persons unemployed because of a labor dispute at premises distinctly separate from their place of employment, clearly indicate that the views of appellant and *amici* on this purported preemption issue are not the views of Congress.

It is the absence, not the presence, of protection of those innocently unemployed because of labor disputes, which infringes upon the uniformity of national labor policy. Blanket disqualifications in a tiny minority of jurisdictions simply give employers a bargainning advantage in those states which they would not have in the overwhelming majority of the jurisdictions of the United States. These special advantages, in addition to creating a clear hazard to the uniformity of national labor policy, are an invitation to employers to flock to these few locations, while increasing unemployment and the burdens on taxpayers in the rest of the Nation. Under these circumstances, these minority enactments operate both to infringe on the uniformity of national labor policy, and to encourage unemployment in those jurisdictions which have not adopted statutory schemes calculated to grant the maximum possible advantage to employers.

Viewed in its proper perspective, the prospect of future taxation for payment of benefits to employees who are innocent victims of a labor dispute would not be a significant factor influencing employer thinking during negotiations while the dispute is in progress. There would be no subsidization of involved or interested parties. The expense to the employer it not incurred while the dispute is in progress, but will be incurred through subsequent taxation, and can be absorbed in budgetary planning and the future costs to consumers of the employer's goods or services. Foremost in the mind of an employer during a labor dispute is the loss of income due to the stoppage of work, and not recoverable future tax liabilities. Even assuming, *arguendo*, that future tax liabilities have some real effect on the thinking of employers during labor negotiations, this prospective liability is simply one of many aspects of actual or potential detriment to their interests which employers might fairly be faced with during stoppages of work caused by labor disputes. The state is not required to remove all present or future burdens from an employer, and place them on innocent employees and the general public.

For the reasons discussed fully above in this Part, the former Ohio labor dispute disqualification, as applied to appellee and other similarly situated, was not rationally related to the furtherance of a legitimate state interest. In the absence of the required rational relationship, appellants Question No. 3 as to whether the statute, in its application to appellee and his fellow steelworkers, furthered a suitable governmental interest must be answered in the negative. And, with regard to appellant's Question No. 2 as to whether a state system of unemployment compensation may predicate disqualification on grounds other than fault, it also must be answered in the negative where the grounds are not

rationally related to furtherance of a legitimate state interest.

D.

THE FORMER OHIO LABOR DISPUTE DISQUALIFICATION VIOLATED THE RIGHT OF APPELLEE AND OTHERS SIMILARLY SITUATED TO DUE PROCESS OF LAW, SECURE AGAINST STATE ACTION UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A state's authority to enact unemployment compensation legislation has been justified as an exercise of the police power of the state. (See, *e.g.*, *Cottrell Clothing v. Teets*, 139 Colo. 558, 342 P.2d 1016 (1959).) However, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States always operates as a limitation on the improper exercise of the police power. (See generally, *Grenada Lumber Co. v. Mississippi*, 217 U.S. 533, 442-443 (1910); see also 16 *Am. Jur.* 2d, "Constitutional Law," Sec. 296.) In order to constitute a proper exercise of the police power, legislation must directly promote the general health, safety, welfare and morals, and be reasonable, and the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in operation, and have a real and substantial relation to such purpose (*Teegardin v. Foley*, 166 Ohio St. 449 (1957); *Froelich v. City of Cleveland*, 99 Ohio St. 376 (1919); *Nolden v. City Comm'n*, 12 Ohio Misc. 205 (1966)).

Tested by the above standards governing the proper exercise of the police power, former Ohio Revised Code

Section 4141.29(D)(1)(a), as applied to appellee and others similarly situated, fails to meet the prerequisites of constitutionality. Appellee has brought out in Parts (A) and (C) of this brief that the legislative purposes for a labor dispute disqualification are (1) limitation of unemployment compensation benefits to persons involuntarily unemployed, (2) the preservation of the neutrality of the state in labor disputes, and (3) protection of the fiscal integrity of the unemployment compensation fund against special risks of depletion. It is modest to state that the former Ohio statute, as applied to appellee and his fellows, did not bear a real and substantial relation to the purported legislative purposes. The former statute, in such application, bore no relation to the stated purposes, real, substantial, or otherwise. Accordingly, the decision of the District Court below was indisputably correct in finding that the former Ohio statute violated due process of law as applied to appellee and others similarly situated (opinion of Court below, 408 F.Supp. at 1022).

Former Section 4141.29(D)(1)(a), in addition to failing to meet the basic prerequisites for constitutionality of an enactment under the police power of the state, is also unconstitutional in creating a permanent and irrebuttable, conclusive presumption which is not necessarily or universally true in fact. Such presumptions have been very recently found constitutionally deficient in a number of high court decisions, both state and federal. *Vlandis v. Kline*, 412 U.S. 441 (1973), involved a state statutory provision which created a permanent and irrebuttable presumption that a student attending a state educational institution remained a nonresident of the state during the entire period of such attendance, if the student had a legal address outside the state for any part of one year preceding his application for admission to the institution. The court in *Vlandis* found that the presumption

of continued nonresidency violated the Due Process Clause of the Fourteenth Amendment, as the presumption was not necessarily or universally true in fact, and the state had reasonable alternative means of determining the fact of residency (412 U.S. 452). In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the court struck down as violative of due process the regulations of two school boards which required respectively that pregnant teachers leave their employment at the beginning of the fifth and sixth month of pregnancy. The purported justification for the regulations was to maintain continuity of instruction, and to insulate the classroom from the presence of incapacited teachers. The court found that the regulations were not required to maintain continuity of instruction so long as the teachers gave adequate advance notice, and that the regulations created an insupportable conclusive presumption that every teacher who reached her fifth or sixth month of pregnancy was physically incapable of continuing her employment (414 U.S. 644). The court also concluded that the Fourteenth Amendment required that school boards employ alternative administrative means to determine the physical fitness of pregnant teachers (414 U.S. 647). Following *Vlandis*, and prior to *LaFleur*, this Court struck down an amendment to the Federal Food Stamp Act which rested on an irrebuttable presumption often contrary to fact (*United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973)). Most informative with regard to the instant case in this Court's *per curiam* decision of last term striking down the Utah unemployment compensation pregnancy disqualification on the ground that it created an insupportable conclusive presumption in violation of the Fourteenth Amendment (*Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975); see also,

following the *Turner* case, and striking down the Colorado unemployment compensation pregnancy disqualification on the ground that it created an irrebuttable presumption violative of due process. *Sylvara v. Industrial Comm'n*, ____ Colo. ____, 550 P.2d 868 (1976)). Relying on reasoning similar to that employed in the above cases, the Supreme Court of Ohio, in *Kinney v. Kaiser Corp.*, 41 Ohio St.2d 120, 322 N.E.2d 880 (1975), invalidated on state and federal constitutional grounds three statutory jurisdictional prerequisites to consideration of death benefit claims under the state's workmen's compensation law. The court determined that the statute created a conclusive presumption that there was no casual connection between a work injury or occupational disease and death, if the dependents of a deceased worker could not establish one or more of the jurisdictional prerequisites. The presumption was invalid since the state had other reasonable and practicable means of establishing the existence or nonexistence of the necessary casual connection without resort to the presumption.

The former Ohio labor dispute disqualification in effect created a permanent, irrebuttable presumption that payment of unemployment compensation benefits to any individual unemployed because of a labor dispute at any premises owned or operated by his employer, anywhere in the United States, would in every instance (1) constitute payment to a person whose unemployment was voluntary, or (2) subsidize one party to the labor dispute, thereby violating the neutrality of the state in labor disputes, or (3) tend to encourage or prolong labor disputes, thereby creating a special risk to the fiscal intergrity of the unemployment compensation fund. Such a presumption is, of course, not necessarily or universally true in fact. It is also clear that the state had reasonable and practicable alternative

means for accomplishing the legitimate purposes of a labor dispute disqualification. It could adopt a statute similar to those in effect in Great Britain and the overwhelming majority of the jurisdictions of the United States (see Part (C), above in this brief), and the state, with regard to circumstances such as presented in the instant case, has been pursuing such an alternative since the 1975 amendment to the Ohio labor dispute disqualification (O.R.C., Sec. 4141.29(D)(1)(a) (Page's 1975 Supp.). The existence of these easily available, less drastic alternatives also answers any assertion that the former Ohio law was required to relieve the state of the burden of "looking into the mind of each individual employee" in order to discern which are involved or directly interested. The typical alternative legislation places the burden on the employee to show lack of participation, financing or direct interest, and disqualifies on the basis of involvement or interest on the part of any employees of the same grade or class as the claimant for benefits, regardless of his asserted individual lack of involvement or interest (see discussion under Part (C), above in this brief). Appellee, while not conceding in the slightest that the former statute can pass muster under appropriate equal protection standards, urges that the legislation is even more vulnerable under the irrebuttable presumption rationale, since consideration of the existence of available reasonable and practicable alternatives is consistently invoked under this due process analysis. (See cases cited immediately above; see also Comment, *The Conclusive Presumption Doctrine: Equal Process or Due Protection*, 72 Mich. L. Rev. 800 (1974); Comment, *Irrebuttable Presumptions: An Illusory Analysis?*, 27 Stan. L. Rev. 449 (1975).

Since the former Ohio labor dispute disqualification, as applied to appellee and others similarly situated, did

not bear a real and substantial relation to a legitimate legislative purpose, appellant's Question No. 3 must be answered in the negative. And, with regard to appellant's Question No. 2 as to whether a state system of unemployment compensation may predicate disqualification on grounds other than fault, it also must be answered in the negative where the grounds constitute legislative resort to conclusive, irrebuttable presumptions which are not necessarily or universally true in fact.

E.

THE DECISION OF THE THREE-JUDGE DISTRICT COURT IS IN CONFLICT WITH THE LAW OF ONLY TWO OF THE FIFTY-TWO JURISDICTIONS OF THE UNITED STATES WHICH HAVE UNEMPLOYMENT COMPENSATION STATUTES, AND IS IN ACCORD WITH THE OVERWHELMING WEIGHT OF LAW AND AUTHORITY.

1. The decision of the three-judge district court conflicts only with the former law of Ohio, and the present law of North Carolina.

Appellant asks as its Question No. 4 presented on this appeal whether the decision of the three-judge district court below is in conflict with other jurisdictions, and against the weight of authority. Appellant then answers this question in the affirmative in its Argument on the merits. (Brief of Appellant, pp. 2, 37.) Appellee has pointed out at length in Part C, above in this brief, that the type of disqualification imposed upon appellee and others similarly situated under former Ohio Revised Code, Sec. 4141.29(D)(1)(a), would have been imposed in only two of fifty-two

jurisdictions of the United States, Ohio and North Carolina. Appellee has also pointed out that this type of disqualification would not be imposed under the present law of Ohio. The fact is admitted that the decision of the court below is in conflict with the view taken by the Ohio Courts that the legislature may constitutionally disqualify any individual, under any circumstances, whose unemployment is the result of a labor dispute at any premises owned or operated by that individual's employer anywhere in the United States (*Cornell v. Bailey*, 163 Ohio St. 50, 25 N.E.2d 323 (1955); *Barnes v. Board of Review*, 1B Unempl. Ins. Rep., Ohio–New Matters Para. 8808 (Ohio App. 1972). However, the district court in the instant case quite correctly determined that the view of the Ohio Courts is insupportable where a disqualification is imposed upon persons in the position of appellee and his fellow workers.

Appellant cites several cases in its search for comfort in jurisdictions other than Ohio and North Carolina. Three of these are decisions of this Court. In *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937), this Court determined that the selection of beneficiaries under the Alabama unemployment compensation law was not so arbitrary or discriminatory as to infringe upon the Fourteenth Amendment to the Constitution of the United States. The validity of the Alabama labor dispute disqualification, as applied to individuals in no way involved or directly interested in a dispute, was not an issue before this Court in *Carmichael*. That case offers no enlightenment as to the state of Alabama law under circumstances such as those present in the instant case, but *the Alabama labor dispute disqualification has been consistently interpreted as inapplicable to persons who are in no way involved or directly interested in a dispute* (*Department of Industrial Relations v. Drummond*, 30 Ala. App. 78,

1 So.2d 395 (1940) *cert. denied*, 241 Ala. 142, 1 So.2d 402 (1940); *Usher v. Department of Industrial Relations*, 261 Ala. 509, 75 So.2d 165 (1954); *United States Steel Corporation v. Goodwin*, 267 Ala. 612, 104 So.2d 333 (1958); *Ex parte McCleney*, 286 Ala. 288, 239 So.2d 311 (1970)). The above interpretation of the Alabama statute has been religiously followed by the appellate courts of that state, and has remained unchanged by the Alabama legislature (*Ex parte McCleney, supra*, 239 So.2d at 314). Consequently, Alabama law is directly opposed to the application of a labor dispute disqualification in the manner which occurred in the instant case, and resort by appellant to unreported, unappended, and unavailable administrative decisions (Brief of Appellant, p. 29) is hardly persuasive in the face of consistent interpretations by the highest court of Alabama over a period of thirty-six years. For the above reasons, appellant's reliance on *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), as also supporting its view of Alabama law, is little less than frivolous.

Appellant maintains that this Court "upheld the 'reasonableness' " of the former Alaska labor dispute disqualification "on facts somewhat similar, but not identical to, the facts in the instant case." Appellee has carefully examined to opinion in *Unemployment Compensation Comm'n of Territory of Alaska v. Aragon*, 329 U.S. 143 (1947), *rehearing denied* 329 U.S. 834 (1947), and could not discern that portion of this Court's decision which passed upon the question of the "reasonableness" of the Alaska statute. Perhaps appellant can further enlighten the Court, and appellee, on this point in a reply memorandum or at oral argument. To avoid any semblance of indulging in semantic quibbling, appellee will grant that the *Aragon* case and the instant case are "somewhat similar" in that

both cases involve labor disputes and disqualification from unemployment compensation benefits. Beyond this, however, there are some rather startling, decisive dissimilarities. The claimants for benefits in *Aragon* were unemployed because of a stoppage of work at canneries where they had been employed in Alaska. The stoppage of work occurred when claimants' employers and the labor union of which claimants were members, and which was their recognized bargaining agent, failed to reach an agreement concerning the wages, hours, conditions of employment and the like of the claimants (329 U.S. 146-147). The facts in *Aragon* established that the claimants, through the agency of their labor union, were active participants in, and directly interested in a labor dispute in active progress at the premises where they were employed. That state of facts being the precise opposite of the facts in the instant case, appellee is at a complete loss in fathoming the manner in which the decision of the District Court below conflicts with *Aragon*. However, appellee, in support of the decision of the District Court, would like to note that this Court in *Aragon* did recognize that the Alaska unemployment compensation statute was *intended to benefit persons involuntarily unemployed through no fault of their own*, and that labor dispute disqualifications are a reflection of the broad policy that unemployment compensation legislation is designed to compensate only persons involuntarily unemployed (329 U.S. 154 n. 14).

Appellant next seeks solace in two *Michigan* and *Wisconsin* cases of over thirty-five years vintage. The case of *Chrysler Corporation v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941), was expressly overruled in *Park v. Appeal Board of Michigan Emp. Sec. Comm'n.*, 355 Mich. 103, 94 N.W.2d 407, 420 (1959), *app. dismissed* 360 U.S. 251 (1959). Obviously, the *Smith* case does

not constitute supporting authority for any proposition of law. The decision in *Spielmann v. Industrial Comm'n.*, 236 Wis. 240, 295 N.W. 1 (1940), was based on a finding that three automobile manufacturing plants, synchronized and operated as a unit, were one "establishment" within the meaning of the Wisconsin labor dispute disqualification. Two of the plants were within forty miles of each other, two were within ten miles of each other, and they were found to constitute a single establishment in view of their physical proximity, functional integrality, and general unity. *Spielmann* cannot be taken to support denial of benefits to persons unemployed because of a labor dispute at premises distinctly remote from their place of employment, and where there is no functional integrality or general unity of the separate premises. Appellee directs the attention of this Court, and of appellant, to three more recent decisions of the Supreme Court of Wisconsin on the issue as to whether individuals are disqualified under Wisconsin law because of a labor dispute at locations remote from their place of employment. In *Abendroth v. Dept. of I., L., & H. Rel.*, 69 Wis.2d 736, 233 N.W.2d 343 (1975), the court determined that airline ground employees laid off at terminals in Madison and Milwaukee, because of a strike by pilots and the establishment of picket lines in Minneapolis and Seattle, were not disqualified from receipt of unemployment compensation benefits. (See similarly, *Liberty Trucking v. Dept. of Industry, etc.*, 57 Wis.2d 331, 204 N.W.2d 457 (1973); *Schaeffer v. Industrial Comm'n*, 11 Wis.2d 358, 105 N.W.2d 762 (1960).)

The above analysis establishes that the decision of the District Court below, in determining that payment of unemployment compensation benefits to individuals unemployed by reason of a labor dispute is required

under the circumstances presented in the instant case, is in conflict only with the former law of Ohio and the present law of North Carolina (see immediately below for discussion of North Carolina law).

2. The Abernathy case.

The decision of the District Court below is in conflict with the view expressed by the Supreme Court of North Carolina in *In Re Abernathy*, 259 N.C. 190, 130 S.E.2d 292 (1963), *cert. denied, sub. nom. Abernathy v. Eastern Airlines*, 375 U.S. 161 (1963). (This Court's denial of *certiorari*, of course, imports no expression of opinion on the merits of the *Abernathy* case.) While some factual distinctions might be urged between the instant case and *Abernathy*, they are not sufficient to avert the necessary conclusion that *Abernathy* clearly holds that a legislature may validly disqualify noninvolved, disinterested individuals from receipt of unemployment compensation benefits where their unemployment is due to a labor dispute at premises owned or operated by their employer anywhere in this world or universe. Consequently, appellee must quite candidly take the position that *Abernathy* was incorrectly decided, ans was the product of faulty legal and constitutional analysis.

The court in *Abernathy* does recognize initially that an unemployment compensation fund is to be used for the benefit of persons unemployed through no fault of their own (130 S.E.2d 296). The rest of the opinion is entirely devoted to justifying a clearly insupportable violation of this principle. The court quotes a legal periodical, citing the neutrality of the state and the need to preserve the integrity of the unemployment compensation fund as being the reasons behind labor

dispute disqualifications (130 S.E.2d 297). However, at this point, as throughout its opinion, the court fails to enlighten us as to why a labor dispute disqualification as drastic and overbroad as the North Carolina statute is required to serve the recognized purposes of such a disqualification. Also, the reference to the legal periodical article represents a classic case of incomplete quotation taken out of context. The paragraph of the article immediately following the portion quoted by the court reveals the very relevant fact, ignored by the court, that the British unemployment compensation law was amended in 1924 to exempt an individual from the labor dispute disqualification where it was shown that neigher he nor any employees of the same grade or class were participating or directly interested in the dispute (Haggart, *Unemployment Compensation During Labor Disputes*, 37 Neb. L. Rev. 668, 686 (1958)). The court next advises us that employers could not have contemplated that their tax money would be used to encourage any stoppage of work resulting from a labor dispute. The court, however, fails to enlighten as to how payment of benefits to persons in no way involved or directly interested in a labor dispute would tend "to encourage any stoppage of work". The court then states that at the time of initial adoption of unemployment compensation legislation, it is doubtful that it was in the contemplation of the Federal or state legislatures that unemployment compensation benefits would be payable to persons in the situation of the claimants in *Abernathy*. This rather broad assumption as to the history of unemployment compensation legislation is made in total disregard of the fact that, from the initial stages of unemployment compensation statutes, no jurisdiction, including North Carolina, sought to disqualify noninvolved and disinterested individuals who became unemployed by reason of a labor dispute at

premises distinctly remote from their place of employment. (See discussion of history of labor dispute disqualifications under Part C, above in this brief.) The type of disqualification imposed by the North Carolina statute was hardly in harmony with the historical evolvement of unemployment compensation law. To the contrary, it was the novel invention of the North Carolina legislature, enacted in 1961, conceived decades after the initial stages of unemployment compensation statutes, and calculated only to afford unwarranted tax relief to employers, while denying their employees relief from the suffering occasioned by involuntary unemployment. This type of disqualification, in the entire history of unemployment compensation law in the United States and Great Britain, has been imposed outside North Carolina only by the former Ohio statute, enacted in 1963 (1963 Ohio Laws, 130:972, 974), and repudiated by the Ohio legislature in 1975 (opinion of the court below, 408 F.Supp., at 1018). Consequently, the attempt of the court in *Abernathy* to establish a historical justification for the statute in issue was wholly without substance.

The court, following its attempt to find historical justification for the North Carolina statute, cites several cases from other jurisdictions in support of its position (130 S.E.2d 298-299). An examination of these cases reveals that none of them, save perhaps the cited Ohio case, supports the proposition that a labor dispute disqualification may properly be imposed on noninvolved, disinterested individuals, where the dispute is at premises distinctly remote from their place of employment (*Cameron v. DeBoard*, 230 Ore. 411, 370 P.2d 709 (1962) (facts supported finding of participation and direct interest of claimants); *De Paoli v. Ernst*, 73 Nev. 79, 309 P.2d 363 (1957) (joint negotiations for industry-wide contract affecting all claimants); *Spielmann v. Industrial Comm'n*, 236 Wis. 240, 295 N.W. 1

(1940) (not supportive of the *Abernathy* view for reasons discussed above in this Part of this brief); *Ford Motor Company v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950) (claimants, under principal-agent theory, bound by authorized acts of their union in initiating work stoppage); *Park v. Appeal Bd. of Michigan Emp. Sec. Comm'n*, 355 Mich. 103, 94 N.W.2d 407 (finding that Michigan plant and Ohio plant were not one establishment–prior case to the contrary overruled) *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942) (dispute between claimants' union and employers over contract covering terms and conditions of claimants' employment). The Ohio case relied on by the court, *Adamski v. Bureau of Unemp. Comp.*, 108 Ohio App. 198, 161 N.E.2d 907 (1959), is entirely irreconcilable with a later decision of the Supreme Court of Ohio in *Abnie v. Ford Motor Co.*, 175 Ohio St. 273, 194 N.E.2d 136 (1963), finding that automobile plants in Ohio and a plant in Michigan were not one establishment. Consequently, *Abnie* must be viewed as overruling *Adamski* by implication.

Thus far we have seen the *Abernathy* court relying on an insupportable interpretation of the history of unemployment compensation law, quoting a legal periodical article out of context in a misleading manner, and relying on case authority which was clearly distinguishable, save for one case which was subsequently stripped of its vitality. The court next treats us to some general observations on the validity of statutes where a legislature acts with reasonableness, and general statements as to the power of a legislature to make classifications (130 S.E.2d 299). Appellee disagrees with none of these general propositions, but feels compelled to point out that the court fails to indicate the manner in which the North Carolina statute is reasonably required to further any legitimate state interest when

applied to noninvolved, disinterested individuals unemployed because of a labor dispute at premises remote from their place of employment. The overall weakness of the reasoning in *Abernathy* is manifestly demonstrated by the court's concluding comments. The court points out that unemployment compensation acts commonly contain disqualifications for (1) discharge for misconduct, (2) refusal to accept suitable employment, and (3) participation in a strike. The court then astonishingly advises us that the challenged labor dispute disqualification involved a question of "degree and not principle." Appellee must strongly disagree. The three examples given by the court all involve some element of voluntariness or fault in the conduct of the disqualified individuals. The labor dispute disqualification, however, extends to situations where there is a total absence of these factors, and its application in these situations is not a matter of degree. It is a clear violation of the basic principles underlying all unemployment compensation statutes.

For the foregoing reasons, appellee respectfully submits that the *Abernathy* case was incorrectly decided, and offers no persuasive authority in support of the validity of the former Ohio statute as applied to appellee and others similarly situated.

3. The decision of the three-judge district court is in harmony with the overwhelming weight of law and authority.

Appellant's claim that the decision of the court below is against the weight of law and authority (Brief of Appellant, p. 37) is nothing short of baffling. It has been repeatedly pointed out at all stages of this case that persons in the position of appellee and his fellow steelworkers, in December of 1974, would have been

denied unemployment compensation benefits in only two of fifty-two jurisdictions of the United States, Ohio and North Carolina. The denial of benefits would now occur in only one of fifty-two jurisdictions, North Carolina. We are indeed confronted with a mystifying form of higher mathematics when the view formerly entertained in 3.8 percent of the jurisdictions of the United States, and now subscribed to in only 1.9 percent of those jurisdictions, is said to constitute the "weight of law and authority". The absurdity of this proposition is so patent that further discussion of the question is not warranted.

F.

U.S. STEEL CORPORATION AND REPUBLIC STEEL CORPORATION SUFFERED NO DEPRIVATION OF CONSTITUTIONAL RIGHTS.

The appellant raises as the fifth question presented on appeal the following question: "Does the decision of the Three Judge District Court deprive the respective employers [U.S. Steel Corporation and Republic Steel Corporation] of their substantive and procedural due process rights under the 5th and 14th Amendments?" Brief for Appellant at 2. As the following discussion of this question will demonstrate, U.S. Steel and Republic Steel for a number of reasons were not deprived of any constitutional rights.

1. The three judge district court did not deny U.S. Steel Corporation and Republic Steel Corporation any rights because the issue as to their alleged interest in the case was never presented to the court at any time prior to the date the court rendered its decision.

The appellant, in answering the fifth question presented on appeal in the affirmative, places emphasis on the allegation that U.S. Steel Corporation and Republic Steel Corporation were, in the appellant's words, "*denied* an opportunity to appear and present evidence bearing upon the economic effect of paying benefits." (Emphasis added.) Brief for Appellant at 34-5. Actually the lower court did not *deny* and could not have *denied* these corporations any rights because the issue relating to their alleged interest in this litigation was never presented to the three judge district court before the court rendered its decision.

a. The issue was never presented to the three judge district court by the appellant.

Rule 12 of the *Fed. R. Civ. P.* provides many means by which a party litigant may raise an issue relating to the lack of an indispensable party under Rule 19 of the *Fed. R. Civ. P.* Pursuant to Rule 12, this particular issue may be presented to the court in any one of four ways: (1) in a motion under 12(b); (2) in an answer or other pleading under Rule 7(a); (3) in a motion for judgment on the pleadings; (4) or at the trial on the merits.

In the present case, the appellant did not follow the aforesaid procedural mechanisms so as to present to the lower court the issue which the appellant now raises for

the first time in an appellate context.[1] For example, the appellant did not file a motion under Rule 12(b). Moreover, in its answer the appellant did not plead the defense of the lack of an indispensable party. Nor did the appellant ever suggest this as an issue in the briefs which were filed in the lower court proceeding. Finally, the appellant did not raise this issue at the hearing on the merits before the three judge court on October 23, 1975.[2]

b. The Motion to Intervene filed by U.S. Steel Corporation and the Motion To Intervene filed by Republic Steel Corporation were not filed until many weeks after the three judge district court rendered its decision.

The lower court rendered its decision on March 5, 1976. Some seven weeks later, on April 21, 1976, U.S. Steel Corporation filed a Motion to Intervene as a

[1] Notwithstanding the appellant's failure in this respect, this court, of course, has the authority to consider this issue. 3A *J. Moore, Federal Practice* par. 19.19 at 2582 (2d ed. 1974).

[2] In its brief the appellant asserts that the hearing on October 23, 1975, was not a hearing on the merits of the case. According to the appellant, "[i]t was the understanding of both parties in the court below that the issue before the Three Judge District Court concerned the propriety of class certification, the adequacy of notice to the class members and the necessity for a three judge court." Brief for Appellant at 34. While counsel for the appellee cannot definitively speak as to what the appellant's understanding was regarding the nature of this hearing, counsel for the appellee unquestionably understand that the hearing specifically related to the merits of the case. The appellant's position on this matter is incongruous, if not contemptuous of the three judge court, in light of the fact that prior to the hearing date in question counsel for the appellee and counsel for the appellant both filed briefs with the lower court, which briefs dealt extensively with the merits of the case.

matter of right pursuant to Rule 24(a) of the *Fed. R. Civ. P.* Subsequently, on May 26, 1976, Republic Steel Corporation followed suit and filed a Motion to Intervene as a matter of right. The three judge district court, in two separate orders, denied the aforesaid motions because the court determined that it no longer had jurisdiction to entertain these motions since the appellant had filed, prior to the dates the motions were filed, a Notice of Appeal. Alternatively, the court below ruled that the motions had not been filed in a timely fashion and that therefore they had to be overruled.

U.S. Steel Corporation and Republic Steel Corporation had a right to appeal the lower court's orders denying their respective Motions to Intervene. 3B *J. Moore, Federal Practice* par. 24.15 at 24-561 (2d ed. 1976). Yet, these companies elected not to appeal the orders and as a result the orders are *res judicata* as to these employers. See *Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906 (8th Cir. 1964), *cert denied*, 382 U.S. 815 (1965).

In summary, because the appellant never raised the issue in the district court as to any alleged interests of U.S. Steel Corporation and Republic Steel Corporation in the present litigation and because neither of these corporations filed a timely motion to intervene, the three judge district court did not deny these corporations any constitutional rights.

2. U.S. Steel Corporation and Republic Steel Corporation did not suffer any deprivation of constitutional rights by not being party litigants in the present case.

a. No authority supports the appellant's arguments that the aforesaid corporations were denied their constitutional rights.

Appellant asserts that under Ohio's unemployment compensation experience rating system for employers

that U.S. Steel and Republic Steel will be subject to a higher unemployment compensation tax rate as a direct result of the lower court's decision.[3] This consequence, according to the appellant, "constitutes a denial of substantive due process in that there is no procedure by which a Federal Court may engage in the legislative function of establishing tax rates." Brief for Appellant at 36.

The appellant also argues, without any elaboration, that the lower court's decision, to the extent that it may affect several employers' tax rates, "is in violation of the Tenth Amendment of the United States Constitution." Brief for Appellant at 36.

The aforesaid arguments of the appellant are without merit as is evidenced by the fact that appellant cites no authority as supporting these propositions of law.

b. U.S. Steel Corporation and Republic Steel Corporation were not indispensable parties to litigation.

While never explicitly expressed by the appellant, the essence of the appellant's argument relating to the issue under discussion appears to be that U.S. Steel and Republic Steel were indispensable parties to the present litigation and since the three judge district court rendered its decision in their absence these corporations were denied their constitutional due process rights.

[3]The appellant alleges that as a result of the decision $2,156,800.00 in benefits could be paid. Brief for Appellant at 35. However, U.S. Steel and Republic Steel in their Briefs as *Amici Curiae* place the potential benefits at a much lower and more realistic figure. E.g., U.S. Steel cites a figure of $316,000.00, for its company, (Brief for U.S. Steel Corporation as *Amicus Curiae* at 2) and Republic Steel cites a figure of $454,700.00 for its company (Brief for Republic Steel Corporation as *Amicus Curiae* at 4) for a total of $770,700.00.

There is no doubt that any indispensable party issue is shrouded with constitutional due process overtones. See 3A *J. Moore, Federal Practice* par. 19.01-1 at 2118 (2d ed. 1974). However, in the present case, U.S. Steel and Republic Steel were not indispensable parties and therefore they were not denied due process of law under the Constitution.

Before a person can be deemed an indispensable party under Rule 19(b) of the *Fed. R. Civ. P.*, that person must first be determined to be a necessary party under Rule 19(a) of the *Fed. R. Civ. P.* Rule 19(a) provides in pertinent part:

> (a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

In the case at bar, the two steel companies were not necessary parties under the first provision of Rule 19(a) because complete relief between the appellee and the appellant was accorded the parties in the absence of the corporations. Indeed, even if the appellee's employer had been a party, the court below would have been powerless to award the appellee any relief against his employer since his employer does not control or administer the Ohio unemployment compensation system.

The second subdivision of Rule 19(a) is likewise not applicable to U.S. Steel and Republic Steel. These corporations are not necessary parties under Rule 19(a)(2) because their alleged interest in the subject of the action, *i.e.*, the payment of unemployment compensation benefits, either does not exist or is at the most indirect.

First, it is clear that the employers do not have an interest in the litigation merely because they pay money into the fund out of which unemployment compensation benefits are paid. This Court in *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951) decided the issue of "whether the National Labor Relations Board must deduct from back pay awards to discriminatorily discharged employees sums paid to them as unemployment compensation by a state agency." 340 U.S. at 361. In ruling that the Board had the power to enter an order refusing to deduct unemployment compensation benefits from back pay, this Court observed:

> Payments of unemployment compensation were not made to the employees by respondent the employer but by the State out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. 340 U.S. at 364.

Secondly, U.S. Steel Corporation and Republic Steel Corporation do not have an interest in the subject of the action because their unemployment compensation tax rates may be affected by the payment of benefits to the appellee and other class members. This purported interest is simply too indirect and incidental to justify the appellant's contention. In *NLRB v. Gullett Gin Co.*,

this Court was confronted with the employer's argument the NLRB's order refusing to deduct unemployment compensation benefits from a back pay award was in the nature of a penalty because the employer would thereby be prevented from qualifying for a lower unemployment compensation tax rate. This Court summarily dismissed this argument in stating that "[w]e deem the described injury to be *merely* an *incidental* effect of an order which in other respects effectuates the policies of the federal act." (Emphasis added.) 340 U.S. at 365.

Finally, the untenable nature of the appellant's argument relating to the employers' interest in this case is highlighted when the argument's logical extension is considered. The Ohio unemployment compensation act in sec. 4141.25 of the *Ohio Rev. Code* establishes a procedure whereby the tax rates for *all* employers are adjusted on an annual basis depending on whether the unemployment compensation fund is above or below a "minimum safe level" as that term is defined in the act. For instance, each tax rate set forth in the experience rating table is reduced by two tenths of one per cent if the fund is 30% or more above the minimum safe level and each tax rate is increased five tenths of one per cent if the fund is sixty per cent below the minimum safe level, with there being gradations of tax decreases or increases between these two extremes. *Ohio Rev. Code* sec. 4141.25 (Page 1973). To the extent that the lower court's decision, if upheld, will result in the reduction of monies in the fund, the tax rate of every employer subject to the Ohio unemployment compensation act may be affected. Applying the appellant's argument that U.S. Steel and Republic Steel were indispensable parties because their tax rates may be affected, every employer subject to the Ohio act would be an indispensable party because every employer's tax

rate may be affected by the decision. This obviously untenable position demonstrates that the appellant's argument is not well founded.

Even though no case authority has been found which speaks directly to the issue of whether an employer is a necessary party in a case such as the present one, a recent opinion of this Court can be interpreted to inferentially stand for the proposition that an employer is not a necessary party in a case like the one at bar. In *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), the petitioner challenged the constitutionality of a Utah statute which denied her unemployment compensation benefits for a period extending from 12 weeks before the expected date of the birth of her child until a date 6 weeks after her child was born. This Court in a *per curiam* opinion held that the statute was unconstitutional and reversed the Utah Supreme Court decision which had held that the statute was constitutional *Turner v. Department of Employment Security* 531 P.2d 870 (Utah 1975). As in the present case, the petitioner's employer in *Turner* was not a defendant in the lower court proceeding and was not a party in the proceeding before this Court. This fact is significant because Utah's unemployment compensation act has an experience rating system for employers (*Utah Code Ann.* Sec. 35-4-7 (1953)), and therefore the petitioner's employer's unemployment compensation tax rate may be adversely affected by this Court's decision. Using Appellant's argument, this fact should have necessitated the petitioner's employer being a party to the litigation. Yet, her employer was not a party to the litigation and the case was decided by this Court in a manner adverse to the petitioner's employer's interest in his favorable tax rate, thereby raising the inference that the petitioner's employer was neither a necessary nor an indispensable party in the proceedings.

And in the final analysis, because an unconstitutional statute confers no rights on any person (*Norton v. Shelby County*, 118 U.S. 425 (1886)), U.S. Steel and Republic Steel have no right to a lower unemployment compensation tax rate as a by-product of the enforcement by the appellant of the statute in question if said statute is constitutionally invalid, as the lower court found it to be.

3. U.S. Steel Corporation and Republic Steel Corporation have suffered no deprivation of any rights because the appellant has vigorously defended the appellee's challenge to the statute in question and because this Court has afforded these corporations the opportunity to advance their legal arguments opposing the lower court's decision.

a. The appellant has vigorously defended the appellee's challenge to the statute in question.

U.S. Steel and Republic Steel in their many motions before this Court have posited the theory that their interest in this case has not been represented because they have a pecuniary interest in this litigation while the appellant's interest is limited to enforcing the laws of the state of Ohio. Unfortunately, this initially enticing theory overlooks the fact that the ultimate interest or goal of the corporations and the appellant is the same, *i.e.*, to deny the appellee and other class members their unemployment compensation benefits. To protect this interest and to achieve this goal, the appellant has vigorously defended appellee's challenge to the statute in question. In vigorously defending this action, appellant has also championed and protected the interest of U.S. Steel and Republic Steel.

b. This court has afforded U.S. Steel and Republic Steel the opportunity to advance their legal arguments opposing the lower court's decision.

After the Notice of Appeal was filed by the appellant, U.S. Steel filed a Motion for Leave to File Brief *Amicus Curiae* and *Amicus Curiae* Brief in Support of Jurisdictional Statement, as did Republic Steel. Both these motions were granted insofar as they related to filing an *amicus curiae* brief in support of jurisdictional statement. After this Court noted probable jurisdiction, U.S. Steel filed a Motion for Leave to File Brief *Amicus Curiae* and *Amicus Curiae* Brief, as did Republic Steel. These motions were also granted. Consequently, both corporations' extensive briefs on the merits of the case are before this Court.

Inasmuch as U.S. Steel Corporation and Republic Steel Corporation have filed briefs with the Court setting forth in detail their arguments relative to the merits of this case, which arguments are basically the same as the arguments of the appellant, these corporations have been afforded adequate opportunity to protect their alleged interest in this litigation.

CONCLUSION

Appellee submits that section 4141.29(D)(1)(a) of the Ohio Revised Code prior to its amendment by the Ohio Legislature in 1975 was in fatal conflict with controlling federal law and furthermore that said statute was unconstitutional under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Therefore, appellee respectfully requests that the decision of the United States District Court for the Northern District of Ohio be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

ALBERT G. GILES,

Appellants,

vs.

LEONARD PAUL HODORY,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES

AND

ALBERT G. GILES,

Appellants,

VS.

LEONARD PAUL HODORY,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

REPLY BRIEF OF APPELLANT

A. Appellee Has Demonstrated No Federal Right to Unemployment Compensation.

Appellee-Plaintiff here and in the court below has argued that the Ohio labor dispute disqualification as it appeared in 1974-75 served to deprive them of due process of law thus violating their 14th Amendment rights. As this court is well aware, a claim based upon due process is actionable only if there is the allegation of the deprivation of a constitutionally

secured or protected right. This means that "due process" is the vehicle by which other federal constitutional rights are protected. Thus a court in its examination of an alleged due process deprivation does not automatically achieve subject matter jurisdiction upon the utterance of the magic words "due process", but must inquire whether the alleged due process deprivation involves a fundamental or constitutionally protected right. In *Paul* v. *Davis*, 96 S. Ct. 1155 (1976) and *Kelley* v. *Johnson*, 96 S. Ct. 1440 (1976), this court recognized that due process does not extend to every perceived inequity allegedly suffered at the hands of the state but, rather, it applies only where there is involved an underlying federal or constitutional right, which unemployment compensation is not.[1] In *Paul* v. *Davis*, *supra*, at 96 S. Ct. 1160, this court recognized that the 14th Amendment of the U.S. Constitution can be applied *only* in the presence of an *express federal right*. This court then referred to the case of *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961) saying that it had been actionable on 14th Amendment grounds only because it involved an infringement of the plaintiff's 4th Amendment rights. This court in *Paul* v. *Davis* then reapplied that reasoning and found no merit to the plaintiff's claim because he had pointed to "no specific constitutional guarantee safeguarding the interest he asserts."

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[1] Recently this court in *Lavine* v. *Milne*, 96 S. Ct. 1010 (1976) addressed an analogous situation. In *Lavine*, *supra*, this court had before it an appeal from a three-judge district court which had declared certain provisions of the New York welfare laws unconstitutional under the 14th Amendment and 42 U.S.C. 1983. In reversing the three-judge panel, this court stated at 96 S. Ct. 1015 N. 9 citing *Dandridge* v. *Williams*, 397 U.S. 471, 90 S. Ct. 1153 (1970) that "Welfare benefits are not a *fundamental right*, and neither the State nor Federal Governments are under any sort of constitutional obligation to guarantee minimum levels of support." (Emphasis added) This decision came on the heels of this court's earlier decision in *Mathews* v. *Eldridge*, 96 S. Ct. 893 (1976) in which this court intimated that Social Security payments were even less necessary than welfare payments. Thus, it must be concluded that State Unemployment Benefits which are matters of state discretion, are also less necessary than the welfare payments which this court stated were not of a fundamental right nature.

In the instant case, Appellee's due process arguments, here and below, can be deemed viable only if Appellee-Plaintiff can point to some authority establishing a federal, as opposed to a state, substantive right to unemployment compensation benefits upon the facts asserted. So far, Appellee has failed to do so. (See Transcript Pg. 45-46) Appellee-Plaintiff's argument here and below proceeds on the theory that 42 U.S.C. 502 and 503, and 26 U.S.C. 3304 somehow magically create a hitherto undiscovered federal right to unemployment compensation while unemployed due to a labor dispute. They do not.

42 U.S.C. Section 501-503 sets forth certain procedural requirements of notice and hearing that must be complied with if a state is to receive federal funds for the administration of its program. 42 U.S.C. 501-503 *does not* set forth any substantive law requirements, *does not* provide federal money for the payment of benefits, and *does not* create any fundamental right to unemployment compensation. Although 26 U.S.C. 3304 comes somewhat closer to creating substantive rights to state unemployment benefits, it stops short of that stating instead, that individuals seeking work cannot be forced to become "strike breakers" or accept worse working conditions than they previously had. 26 U.S.C. 3304, like 42 U.S.C. 503, *does not* by implication create any federal right to unemployment compensation while unemployed due to a labor dispute.[2] As stated initially in Appellant's brief, p. 24, 42 U.S.C. 303, 501, and 503

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[2] When Congress desired to authorize unemployment compensation to employees who became "unemployed" as a result of a labor dispute, it has done so expressly. In 1938 Congress removed railroad workers from the unemployment compensation provisions and in section 204(a-2)(iii)[45 U.S.C. § 354(a-2(iii)] of the Railroad Unemployment Insurance Act created a federal reserve of payments to these workers while on strike *if* their strike was not contrary to the Railway Labor Act (44 Stat. 577 (1926), 45 U.S.C. §§ 151 et seq.) or union rules.

(Footnote continued on following page)

give rise only to *procedural* rights the violation of which may properly be a 42 U.S.C. 1983 action. [See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971)] However, the instant case does *not* involve any alleged deprivations of *procedural* rights and thus contains no valid assertion of any federal or constitutionally protected right.

Appellee in its answer brief has attempted to demonstrate some sort of "common law" right vindicated in various cases which it cites. However, in none of the cases cited by Appellee is there any indication of any fundamental or constitutionally protected right of unemployment compensation such as would trigger 14th Amendment protection and thus the cases cited by Appellee are distinguishable. In *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975), *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Lincoln* v. *True*, 408 F. Supp. 22 (1975) cited by Appellee at p. 21 of Appellee's brief, there was an underlying fundamental right involved that was unrelated to unemployment compensation: namely, the First Amendment, which is not present in the instant case. In *Bowen* v. *Hackett*, 361 F. Supp. 854, (1973) there was a recognized suspect classification: namely, sex, which is likewise not present in the instant case. Thus, the only right in issue in the instant case, the

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(Footnote continued from preceding page)

This legislative change, to create an economic incentive for railroad workers to support the peaceful resolution of labor disputes and to discourage resort to "wildcat" strikes in an industry vital to the public interest (*Bhd. of Railway Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37, 42-3 (D.C. Cir. 1956), did not signal a broad congressional design or desire to create unemployment compensation for workers in other industries who might be laid off as a result of a labor dispute. Congress desired only to add this incentive to protect interstate commerce from interruption of vital transportation services. This Court has cautioned against drawing inferences from this legislation. "Both its history and the interests it governs show the Railway Labor Act to be unique." *Whitehouse* v. *Illinois Cent. R.R.*, 349 U.S. 366, 371 (1955).

right to unemployment, if a right at all, is one wholly of *state origin* and the court below erred in finding this case appropriate material for a 42 U.S.C. 1983 action. (See *Dorsey* v. *N.A.A.C.P.*, 402 F. 2d 1022 [C.A. La. 1969] cert. denied, 90 S. Ct. 58, 396 U.S. 847 and *Ortega* v. *Ragan*, 216 F. 2d 561 [C.A. Ill.] 1954 cert. denied, 75 S. Ct. 786, 349 U.S. 940.)

Appellee cites, quite correctly, that certain administrative functions of the Ohio Act are financed by and under the Federal Social Security Act 42 U.S.C. 501-503 and Federal Unemployment Tax Act 26 U.S.C. 3304. Appellee, however, jumps to an unwarranted conclusion when he states at p. 6 that the "Ohio unemployment compensation system is 'governed' by the Federal Social Security Act and FUTA." Such is not the case. Appellant's brief at p. 24-31 sets forth with clarity the fact that each state is free to "govern" its own system and to tailor its program to its own particular needs.

In this context, it is significant that even the Federal Government, via Internal Revenue, acknowledges that each state is to be free to establish whatever program it, the state, desires. Rev. Ruling 75-87 I.R.B. 1975-11, 15 states that the purpose of this Act (Title IX of the Social Security Act, Pub. L. No. 27) [74th Cong.] was *not* to set up a Federal unemployment compensation system but "What it seeks to do is merely to make it possible for the states to establish unemployment compensation systems and to stimulate them to do so."

Appellee, in his attempt to find a conflict between Ohio and Federal law, fails to address two other major issues in that he ignores the fact that the funding received from the Federal Government can be refused by the State and, if accepted, is still not used for benefit payments but for program administration. Although the Federal Government no doubt can impose contractual conditions precedent to the receipt of this money, they as yet have not required that it be paid under circumstances like those in the instant case and, thus, have created no right on

these facts. Secondly, the Appellee has failed to explain why the Secretary of Labor has consistently approved the Ohio program for federal funding if it is as "contrary" to federal law as Appellee claims it is.

This court should consider well the possible ramifications that could flow from a finding in this case that federal substantive rights inhere in a state unemployment compensation system. Such a finding might possibly lead to federal court litigation of an untold number of unemployment benefit cases, a matter clearly not contemplated by the "arising under" language of the U.S. Constitution.

B. A Holding that the Social Security Act Requires Coverage of Those "Unemployed Due to a Labor Dispute", a Group Specifically Excluded Under Ohio Law, Would Be An Unconstitutional Infringement Upon the Sovereignty of the State and Violate the 10th Amendment of the U.S. Constitution.

The basic structure of the Federal-State unemployment compensation program has remained unchanged since the enactment of the Social Security Act on August 14, 1935. In Title IX of that act, a payroll tax of 3 percent was laid on private sector employers. A credit of up to 90 percent of the tax, or 2.7 percent, was allowable for contributions paid into a State unemployment fund, under a State unemployment compensation law found to meet the conditions for approval set out in Title IX. A State which had an approved unemployment compensation law could apply, under Title III of the act, for grants of funds to assist the State in the administration of its law; the payment of such grants would be certified upon a finding that the State law contained the further provisions required by Title III. The provisions on grants remained in Title III of the Social Security Act, 42 U.S.C. 501 et seq., while the taxing provisions are in the Federal Unemployment Tax Act, Chapter 23 of the Internal Revenue Code of 1954, 26 U.S.C., 3301 et seq. The requirements for State unemployment compensation laws are set out in 42 U.S.C. 503 (a) and 26 U.S.C. 3304 (a), respectively.

For the first 37 years of this cooperative program, no provision of the Federal statutes required the States to cover any specific class of persons or employees. Inducement or persuasion of State law coverage was founded on the tax credit in the Federal Unemployment Tax Act. Credit against the Federal tax was based on contributions into a State unemployment fund on the same payroll, and coverage of the State law was based on the payroll subject to contributions. In this way, State law coverage for compensation purposes was generally as broad as the tax coverage of the Federal Unemployment Tax Act, although the States retained the authority to adopt more restrictive coverage or expand coverage beyond the inducement provided by the Federal law. It was under this method of operation that this court in *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937) found that the states were not coerced and that the Federal State Cooperative venture was constitutional.

Starting in 1970, Congress began imposing new requirements as conditions precedent to receiving federal funding, however none of those requirements affect the rights of Appellee herein.

Appellant knows of no attempt to date to challenge the imposition of such requirements on 10th Amendment grounds; however, in view of this court's recent decision in the *National League of Cities* v. *Usury* (No. 74-879) U.S. 49 L. Ed 2d 245, 96 S. Ct. (1976), there is now some question concerning their constitutionality.

Although Appellant strongly feels that no federal right to unemployment is created by either or both of 42 U.S.C. 501-503 and 26 U.S.C. 3304, it must be considered that if this court finds that 42 U.S.C. 503 and 26 U.S.C. 3304 do, in fact, impose substantive law requirements that benefits be paid by the State to people clearly not covered by the State's unemployment

insurance law, then 42 U.S.C. 503 and 26 U.S.C. 3304 infringe upon the sovereign right of the State of Ohio to formulate its own program of unemployment insurance and, thus, violate the 10th Amendment.

This court has stated on several occasions that Congress may not constitutionally infringe upon the State's reserved powers and has stated recently that Congress may not "displace the State's freedom to structure integral operations in areas of traditional government functions . . ." *(National League of Cities* v. *Usury, supra,* Slip Opinion at 18) In *National League of Cities* v. *Usury,* this court held that the federal extension of mandatory coverage under the minimum wage and overtime provisions of the Fair Labor Standards Act (29 U.S.C. § 201) to employees of State and local government violated the 10th Amendment by infringing upon the State's reserved powers (Slip opinion 17-18). Similarly, any federal coercion to "cover" or pay benefits to those clearly excluded by the State unemployment insurance law would also violate the 10th Amendment by usurping the State's power to decide for itself whom it should elect to "cover" and what types of unemployment it will compensate.

Although the 10th Amendment to the U.S. Constitution is but infrequently invoked to protect the ability of a State to conduct its own programs, such invocation is not without precedent.

In *National League of Cities* v. *Usury, supra,* this court quoted from *Fry* v. *United States,* 421 U.S. 542, at 547 (1975) saying:

> "While the Tenth Amendment has been characterized as a 'truism', stating merely that 'all is retained which has not been surrendered' *United States* v. *Darby,* 312 U.S. 100, 124 (1941) it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States integrity or their ability to function effectively in a federal system."

This court then proceeded to trace the development of this concept back through earlier decisions of this court by Chief Justice Chase. In *Texas* v. *White,* 7 Wall. 700, 725 (1869), Chief Justice Chase declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." In *Lane County* v. *Oregon,* 7 Wall. 71 (1869) his opinion of the Court stated:

> "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government which acted with powers, greatly restricted, only upon the States. But in many Articles of the Constitution the necessary existence of the States, and within their proper spheres, the independent authority of the States, is distinctly recognized." Id., at 76.

In *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514 (1926), the Court likewise observed that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.

In *National League of Cities* v. *Usury, supra,* this court then reasoned that it had "repeatedly recognized that there are attributes of sovereignty attaching to every State government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." (49 L. Ed. 2d 245 at 253)

This court then ruled that one such essential attribute of State sovereignty was the State's power to pay wages to those employed by the State. It is Appellant's position that there is functionally no difference between the payment of wages by the State to its employed and the payment of unemployment insurance benefits to its unemployed. Both are attributes of

State sovereignty, both are determined in part by local conditions and federal interference with either will impact adversely on the fiscal integrity of their respective funds. (See Appellant's Brief, p. 11)

To hold that 42 U.S.C. 501-503 and 26 U.S.C. 3304 require coverage in an area where none is intended or budgeted for by the State unemployment insurance program would constitute the type of intrusion upon the State's sovereignty that was forecast by the separate opinions of Mr. Justice McReynolds, Mr. Justice Sutherland with whom Mr. Justice Van Devanter concurred, and in the dissenting opinion of Mr. Justice Butler in *Chas. C. Steward Mach. Co.* v. *Davis, supra.* Mr. Justice Sutherland stated:

> "If we are to survive as the United States, the balance between the powers of the nation and those of the states must be maintained. There is a grave danger in permitting it to dip in either direction, danger—if there were no other—in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment (Social Security Act) upon the administrative functions of the states is that greater encroachments, and encroachments upon other functions, will follow." *Chas. C. Steward Mach. Co., supra,* at 616.

The Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curial recognizes that appellee's argument, that the Supremacy Clause of the U.S. Constitution has somehow preempted State law in the area of unemployment benefits, is not well taken. The AFL-CIO Brief at 16 stated that the Social Security Board declared shortly after the Act was passed, that paying benefits to persons in the appellee's class was not only permissible but preferable. This is consistent, however, with the Social Security Board's recognition that the states had complete freedom in structuring their own programs, as is evidenced by the cover page of the Social Security Board, *Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types* (1936) stating:

> "This draft is merely suggestive . . . Therefore, it cannot properly be termed a 'model' bill or even a recommended bill. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and right of each state to determine for itself just what type of legislation it desires and how it shall be drafted."

It is Appellant's firm belief that, if 42 U.S.C. 503 and 26 U.S.C. 3304 do, in fact, contradict 4141.29(D)(1)(a), Ohio Revised Code, that these federal statutes impair the sovereign function of the State and its instrumentalities who have made laws believing in their ability to do so and who should not now be subjected to suit for having done so. For this court to force the State of Ohio to pay unemployment benefits where none were intended by the State or Federal governments, and where the state law disqualifying the workers contravenes no fundamental right, would require constant intervention and policing by this court, a function better resolved by resort to the polls and not to the courts. [See *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 488, 75 S. Ct. 461, 465 (1955) rehearing denied 349 U.S. 925, 75 S. Ct. 657 (1955)]

C. Ohio's Statute 4141.29(D)(1)(a) does not offend the United States Constitution nor Deny Equal Protection on the Basis that it is Underinclusive or Results in some Inequality to a Particular Definite Class that has been Exempted from Unemployment Benefits by the State Legislature Under the General Welfare and Police Powers of the Ohio Constitution and the Powers Reserved to the States by the Tenth Amendment.

Almost immediately after the birth of the Unemployment Insurance Act, Federal Social Security Act of August 14, 1935 [49 Stat. at L. 620, Chapter 531, 42 U.S.C. chapter 7 (Supp.)] this honorable court was called upon to determine the constitutionality of the Federal-State system in two landmark

decisions. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937) and *Chas. C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937).

This court laid down the following principles in *Carmichael, supra.*

1. States are free to select the class of workers who shall be eligible for benefits and is not bound to occupy the whole field.
2. Selection of classes, based upon any set of facts that would reasonably sustain the selection, must constitutionally be sustained.
3. Eligibility of benefits are entitled to the same considerations as to their validity as the choice of the subjects of the tax.
4. The legislature, not the courts, have the function of determining the distribution of the burden of the tax.
5. The unemployment compensation fund is administered in accordance with state law by the state commission.
6. Participation in the Federal-State Unemployment Fund does not strip the states of their sovereignty. The power to contract and the power to select appropriate agencies for execution of state policy are attributes of state sovereignty.
7. In establishing a system of unemployment benefits, the legislature may strike at the evils of unemployment where they are most practical and may exclude persons whose need is less or whose effective aid is attended by inconvenience which is greater.

During the years of the great depression, 1929 to 1936, the number of unemployed became a staggering burden upon the Federal government because the states were unable to afford the requisite relief. *Chas. C. Steward Mach. Co., supra,* at 586-587. The problem was national in scope and there was an urgent need for a Federal-State system to mitigate these catastrophic economic conditions.

"According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the fiscal years 1934, 1935 and 1936, the stupendous total of $8,681,000,000. The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in the train." *Chas. C. Steward Mach. Co., supra,* at 587.

Appellees point out that, if the Federal Government's motives for inducing the States to participate in unemployment compensation was to protect the fiscal integrity of the Federal Government's funds, is it no less a compelling reason for the State of Ohio to do likewise?

The Ohio legislature did not enact Section 4141.29 (D)(1)(a) without knowledge of the consequences it would have on the class of employees such as appellee's in the instant case. Prior to 1963, the law disqualified a claimant from receiving benefits if he became unemployed because of a labor dispute *at the factory, establishment or other premises at which he was employed.* Prior to 1963, Ohio courts, under the above language, disqualified claimants such as appellee's. *Cornell* v. *Bailey*, 163 Ohio St. 50, 125 N.E. 2d 323 (1955); *Adamski* v. *Bureau of Unemployment Comp.*, 108 Ohio App. 82, 155 N.E. 2d 518 (1959).

In 1963, the Supreme Court of Ohio again faced the issue of "functional integration" in *Abnie* v. *Ford Motor Co.*, 175 Ohio St. 273, 25 00 2d 110 (1963) but, in construing the Statute, the court held that "establishment" was meant to mean the physical location where claimants were employed; therefore, a strike at an out-of-state plant was not a strike at the Ohio plant so that the claimants' unemployment resulting from their layoff in Ohio was not due to a labor dispute at the factory, establishment or other premises at which they were employed. The Ohio Supreme Court followed rulings of sister state courts,

Michigan, in particular, *Chrysler Corporation* v. *Smith*, 297 Mich. 438, 298 N.W. 87 (1941), wherein the word *establishment* was taken to mean the distinct, physical place of business at which the claimants were employed and did not include the functional integration of various units of a complex industrial enterprise. The Ohio General Assembly immediately responded by amending the law after *Abnie, supra*, as follows:

> "... at any factory, establishment or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his employment is due to such labor dispute." (Underscore denotes 1963 Amendment)

The Ohio legislature cleared up the statutory construction problem and Ohio since then has consistently upheld the constitutionality of disqualifying workers who become unemployed through no fault of their own when their unemployment was due to a labor dispute in a functionally integrated plant. *Lena F. Barnes, et al.* v. *Brd. of Rev.*, 8 CCH, Unemployment Insurance Reports, Ohio New Matters, 38,550 (1972) Ohio followed *Abernathy* v. *Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963) Cert. denied, U.S. Sup. Ct. 355 U.S. 161 (1963).

This court has recognized that the construction placed by the highest court of the state upon its statutes must be accepted by the Federal courts in determining the validity of such statutes under the Federal Constitution. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911). Mr. Justice Van Devanter delivered the opinion quoted below in pertinent part:

> "... it is necessary to inquire what construction has been put upon it by the highest court of the state, for that construction must be accepted by the courts of the United States ... when called upon to determine whether it violates any right secured by the Federal Constitution." (Citations omitted) *Lindsley, supra*, at 73.

Assuming that the district court considered the case law in Ohio concerning the instant case, we must then consider whether appellees could be excluded from receiving benefits by the Ohio legislature or whether as appellees contend, the law has no rational basis, is arbitrary and discriminatory and, therefore, consequently denies the equal protection of the laws as to those whom it affects.

This Court held in *Lindsley, supra*, at 78:

> "The rules by which this contention must be tested, as shown by repeated decisions of this court, are these: (1) the equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or in practice it results in some inequality. (3) When the classification in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." (Citations omitted).

This Court has followed those principles in more recent cases. *Dandridge* v. *Williams*, 397 U.S. 485, 90 S. Ct. 1153 (1970) held that in "... the area of economics and social welfare, a state does not violate equal protection clause merely because the classifications made by its laws are imperfect." *Dandridge, supra*, at 485. The court also held that "mathematical nicety" is not required even if some "inequality" results. *Supra*, 485. (Citations omitted).

Appellants, from the inception of this litigation have steadfastly argued that, in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, the states are free to legislate as to local needs which they believe will be in the best interests of their citizens.

Appellees have failed in their burden to substantiate their mere allegations that either (1) The Constitution supports the allegations contained in their original Complaint or (2) The Federal Government has preempted the State of Ohio in the field of administering the Ohio Unemployment Compensation Statutes. In addition, they have failed to cite any statute or language in the Social Security Act that is in violation of the Ohio Statute 4141.29(D)(1)(a).

In oral argument before the three-judge District Court, the following colloquium occurred:

> *Mr. Clyde:* The point has been raised that the Federal Government and the Labor Department or Social Security Administration do not dictate to the States procedures to follow in the implementation of the State Act. (Transcript, 45)
>
> *Judge Celebrezze:* Can you show me anywhere the Secretary of Labor issues regulations as to when and how benefits should be paid? (T-46)
>
> *Mr. Clyde:* I haven't yet, to the best of my knowledge—(T-46)
>
> *Judge Celebrezze:* Can you show me Federal legislation? (T-46)
>
> *Mr. Clyde:* There is Federal legislation, Your Honor.—(T-46)
>
> *Judge Celebrezze:* Any Federal legislation that deals primarily with the administrative provisions of who is entitled to benefits? (T-46)
>
> *Mr. Clyde:* In the states, no Federal regulations controlling states. There are those dealing with payments to Federal employees. (T-46)

As can be seen from the above answers of Appellees, they could not and have not to this date cited any law or federal conflict with the Ohio Statute. Appellees merely complain that Ohio law is *underinclusive.* They do not contend that the affected class has been treated unequal within the class.

Underinclusive is not a violation of the Constitution as this court held in *Geduldig* v. *Aiello,* 416 U.S. 496, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1947). The "deep pocket" rationale that Appellees are trying to thrust upon this court is not without its followers. Many unions also believe that the employers can simply raise the cost of goods to defray the increased costs. The fallacy of this theory is that this philosophy has in recent years (1) Increased inflation, (2) Caused many marginal businesses to close, (3) Allowed foreign competition to underbid U.S. companies, (4) Denies U.S. citizens products they might otherwise afford, (5) Has forced many companies to leave Ohio and the Northern states to relocate in the South and West because of more favorable taxes and lower or stable wage conditions, (6) Caused further unemployment as a result of plants closing, (7) Discourages company expansion, (8) Increases taxes, not only upon the employer but on the general public and (9) Is directly in conflict with our national policy of holding the line on price increases and stimulating the economy to provide more jobs.

It is not necessary to point out to this court what inflation has done to our grocery bill or the price of automobiles which has doubled in the past decade. Recent forecasts predict that the average Ford, Plymouth and Chevrolet will cost $8,000.00 by the year 1980—just three years hence. Not only this court but every citizen is alarmed at the shrinking purchasing power of their earnings which have not even remained even with inflation. Appellants, therefore, submit that the "deep pocket" theory is out of place in today's economic climate, if, in fact, it ever had any validity in our history.

D. Ohio's Statute 4141.29(D)(1)(a) as Applied to the Facts in the Instant Case Was Necessary to Preserve and Maintain the State's Duty of Neutrality in Labor Disputes.

Appellees agree (Br. 30-35) that labor dispute disqualifications operate rationally to preserve and maintain the state's duty of neutrality in labor disputes. This obligation flows from both the Social Security Act itself and from federal

labor policy. In section 903(a)(5) of the Social Security Act (now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3308), Congress provided that out-of-work claimants could not be denied benefits if they refused to accept employment where a "labor dispute" was in progress, or refused to work for wages and benefits below area standards, or declined to forego the federal right established just one month earlier to join a labor organization.[3] This provision was essential to prevent the unemployment compensation system from undermining collective bargaining (and union membership) rights established concurrently in the Wagner Act. Otherwise, employers could freely utilize out-of-work claimants as strike replacements, thereby using this federal-state program to tip the balance of economic power in their favor during labor disputes with their employees. See H. Doc. No. 81, 74th Cong., 1st Sess. 18 (1935); 79 Cong. Rec. 9271 (1935) (Remarks of Sen. Harrison). As the Supreme Court of California stated in *Matson Terminals, Inc.* v. *California Employment Comm.*, 24 Cal. 2d 697, 707 (1944):

> "The (Social Security) Act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus, the provision disqualifying a worker who leaves his work because of a trade dispute § 56 (a) is balanced by the provision that other unemployed workers shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits

[3] This provision provides in *hace verba:*

> Compensation shall not be denied in such States to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute: (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality: (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization. 26 U.S.C. § 3304(a)(5).

> (§ 13 (b) (1). The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just as would the withholding of payments because a claimant refused to become a strikebreaker."[4]

Thus, Congress was aware of the potential for abuse by employers and employees inherent in this system and legislated a strict separation between the unemployment system and the system of free collective bargaining established within the statutory framework of the Wagner Act.

This *laissez faire* system imposes no obligation upon employers (subject to the jurisdiction of the National Labor Relations Board) or labor organizations to reach agreement on wages, hours, and working conditions. National labor policy embodied in federal labor laws mandates that the resolution of bargaining differences depends upon the balance of economic power existing between the contracting parties. Thus, national labor policy "leaves the adjustment of industrial relations to the free play of economic forces (and) seeks to assure that the play of these forces is truly free." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 183 (1941). See also Cox, *Federalism in Labor Law*, 67 Harv. L. Rev. 1297, 1317 (1954). As Senator Taft stated during floor consideration of his amendments to the Wagner Act (93 Cong. Rec. 3951 (1947) [emphasis supplied]:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on *free collective bargaining.* The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and

[4] See also *Miville* v. *Maine Empl. Sec. Comm'n*, 219 A. 2d 752, 753-54 (Me. 1966); *Sweeney* v. *Board of Rev., Div. of Empl. Sec.*, 43 N.J. 535, 539, 206 A. 2d 345, 347 (1965); *In re Steelman*, 219 N.C. 306, 310, 13 S.E. 2d 544, 547 (1941); *Marathon Elec. Mfg. Corp.* v. *Industrial Comm'n.* 269 Wis. 394, 404-05, 69 N.W. 2d 573, 579-80 (1955); *Saunders* v. *Maryland Unempl. Comp. Bd.*, 188 Md. 677, 682, 53 A. 2d 579, 581 (1947).

> working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right."

However, the exercise of these rights do not carry with them a guarantee of success or immunization from economic loss. This Court has repeatedly recognized this fundamental premise of national labor policy. "[T]he right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *Am. Ship Bldg.* v. *NLRB*, 380 U.S. 300, 309 (1965). "[T]here is nothing in the (National Labor Relations) Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes." Id. at 313. "[T]he (National Labor Relations) Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak . . ." *Porter Co.* v. *NLRB*, 397 U.S. 99, 109 (1970).

Appellees contend Ohio's disqualification is overbroad and does not serve the legitimate and mandatory obligation of state neutrality in labor disputes. Appellees assume and argue (Br. 26) that the payment of unemployment compensation to the steelworkers would have no economic or other impact upon their bargaining strategy or any agreement ultimately reached with the Mineworkers Union. Appellees further argue that the steelworkers must receive compensation because they are not directly interested, participating in or financially supporting the Mineworkers' strike. In support of these contentions, Appellees and amicus AFL-CIO rely upon the proviso to the model bill drafted by the Social Security Board in 1936.

We contend, however, that Ohio's disqualification is consistent with the proviso, reflects the reality of the "ripple effect" of labor disputes in the present day economy, and prevents the unemployment compensation system from subsidizing employees when their employer is involved in labor disputes.

Of course, the model bill was advisory only and not binding on the participating states. 79 Cong. Rec. 5782 (1935) [Remarks of Cong. Cooper]. While the bill expressed the minimum obligation of neutrality, it did not prohibit states from *further* implementing this mandatory obligation consistent with the economic realities of integrated corporate structures existing in industrialized states. Thus, the fact that other states have not followed Ohio's lead does not necessarily mean that Ohio's disqualification is irrational or subject to invalidation.[5] Other states, differing geographically, climatically, or industrially have simply exercised their right, guaranteed by the 10th Amendment of the U.S. Constitution to formulate their own unemployment insurance programs.

Appellee's "no impact" argument also ignores the substantial wage replacement rate provided by unemployment compensation payments. A recent study of awards made nationwide during 1970 concluded that "benefits generally replace *two-thirds* (⅔) or more of lost net income." (Emphasis in original) Feldstein, "Unemployment Compensation: Adverse Incentives and Distributional Anomalies", 27 National Tax J. 231 (1974). Receipt of such generous benefits would tend to discourage the exertion of any pressure from the Steelworkers

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[5] We note, contrary to Appellees, Congress did *not* permit the same degree of State experimentation with the scope of the duty of neutrality as it did with other aspects of the program. Section 903(a) represents an express mandate of neutrality, and there is no suggestion in the legislative materials that states would be free to ignore this directive in establishing eligibility. Rather, this was one of the minimum federal controls designed to insure that funds would go only to the relief of the actually unemployed. 79 Cong. Rec. 5782 (1935) (Remarks of Cong. Cooper); 79 Cong. Rec. 9284 (1935) (Remarks of Sen. Wagner). The states were left free only to require employee as well as employer contributions, to determine compensation rates, waiting periods and duration of benefits, and whether funds would be in pooled, individual or segregated accounts. S. Rep. No. 628, 74th Cong., 1st Sess. 13-14 (1935).

upon the Mineworkers to compromise or withdraw unrealistic bargaining demands and thus create a negotiated settlement which would end the Mineworkers' strike and enable the Steelworkers to return to work. Similarly, benefit availability for fellow workers would tend to decide close questions in favor of a strike, because economic leverage against an integrated employer could be obtained by forcing the shutdown of other segments of the steel production process without forcing these workers to undergo any appreciable economic deprivation from a layoff. And, of course, the direct cost to the employers in increased unemployment taxes would necessarily affect the employer's bargaining strategy regardless of whether benefits were going to the striking bargaining unit or to other employees. Cf. *Super Tire Eng. Co.*, v. *McCorkle*, 416 U.S. 115, 124 (1974) [availability of state welfare assistance pervades every incipient labor contract].

Moreover, it cannot reasonably be assumed as do Appellees and *amicus* AFL-CIO that the laid off Steelworkers are not directly interested in the labor dispute between their employer and the Mineworkers. Economic concessions granted the Mineworkers in their collective bargaining contract would not be ignored by the Steelworkers in planning their own demands when their contract expires. It is a common experience that employers who bargain with more than one labor organization must be conscious of the fact that these labor organizations commonly coordinate bargaining demands and at least insist on parity with any economic benefits granted another union. Thus, the fact that the Steelworkers are not members of the Mineworkers' bargaining unit and not employed at the same premises is not determinative of their interest. Here, both labor organizations bargain with the *same* employers, and it is likely that all employees, regardless of their union affiliation or place of work, will realize, at least to some extent, the economic benefits obtained by any one employee.

Nor is it as clear as Appellees and *amicus* AFL-CIO would have us believe, that the Steelworkers are not of the "same grade or class" as the Mineworkers. Superficially, they do perform separate work, but the work is an integral part of the on-going steel production process, of the same employers. And as the facts here demonstrate, steel production is largely dependent upon coal processing—in these employers' integrated production processes.

Ohio's willingness to adapt its obligation of neutrality in labor disputes to the changing forms of economic activity which blanket Ohio's economy is supported by Congress' broad conception of "a labor dispute." Twice, Congress has enacted definitions of "labor dispute" which extend its scope beyond common law employer-employee relationships. In 1932, Congress adopted this definition to restrict federal court intervention in such disputes.[6] And in 1935, in the Wagner Act, Congress reenacted this definition to extend broad protection to all persons not just employees of the involved employer.[7] These definitions reflect Congressional awareness of the "ripple effect" of labor disputes which transcend employment relation-

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[6] Section 13 (c) [29 U.S.C. § 113 (c)] of the Norris-La Guardia defines a "labor dispute" as any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

[7] Section 2(9) of the Labor-Management Relations Act provides: The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee. 29 USC. § 152 (9).

ships and also the reality that employees frequently have common interests and goals and engage in supportive activities like picketing and handbilling even without the prospect of direct and immediate benefit to themselves. Here, of course, the interest of Steelworkers in the labor dispute between the Mineworkers and their employers is more immediate and less tangential than that of persons who are not employed by the same employer. We contend Ohio has reasonably taken into account this reality of current industrial relations in extending its disqualification of the same employer to include workers laid off as a result of a labor dispute.[8]

Finally, Appellees contend (Br. 18-22, 42-44) that Ohio's disqualification is overbroad by analogy to the cases holding that uniform pregnancy leave requirements violate the equal protection and due process clauses of the Fourteenth Amendment. These cases provide no analogy to the disqualification here because those regulations were based upon an irrefutable presumption that women could not adequately perform their employment duties beyond a certain period in their pregnancy. See, e.g., *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632 (1974). Ohio's disqualification in contrast is based upon the limited purpose of the Social Security Act, and the federally imposed duty of neutrality in labor disputes. The disqualification here is not just an arbitrary line drawn by the Ohio legislature, but one which flows from full implementation of a national democratic and representative censuses legislated by Congress. While it is true, as amicus AFL-CIO contend, (Br. 16-17) that the Fourteenth Amendment applies to federal as well as state legislation, we contend that it is not irrational under the relaxed scrutiny standard applicable to this case, for Congress to have directed the states to harmonize their unemployment compensation programs with the free collective bargaining policy of federal labor policy by incorporating a duty of neutrality in labor disputes into eligibility under the Social Security Act. It is also essential for the states, particularly industrial states like Ohio, to conserve funds for those actually without jobs in a time when unemployment rates account for at least 7.9% of the workforce. Indeed, many states have had to borrow federal money (which must be repaid) to meet the growing demand from those whom the program was intended to aid. Congress has set up two systems—collective bargaining to aid the underemployed worker, and unemployment compensation to aid the unemployed worker while he actively seeks to reenter the workforce.

[8] To the extent the British Unemployment Compensation does not follow this approach, we respectfully submit this is because British labor relations are not premised upon a system of free collective bargaining. We note, however, that British decisions recognize that employees locked out by an employer in support of a wholly separate employer's bargaining position would *not* be eligible for unemployment compensation payments. See Umpire Decision No. 5117, April 19, 1928 quoted in *In re North River Logging Co.*, Wash. 130 P. 2d 64, 66 (1942)

Appellees also argue (Br. 35) that Ohio's legitimate interest in protecting the fiscal integrity of its unemployment compensation fund does not require denial of payments to persons uninterested and uninvolved in a labor dispute. We have demonstrated above why the claimants here are not wholly uninvolved or disinterested in the labor dispute which led to their layoff because this dispute involves their own employers. Accordingly, they can properly be disqualified from unemployment compensation even under the provision to the model bill.

In any event, the demands of fiscal integrity operate to limit available funds to those actually out of work, even when payments might not directly undermine the employer's bargaining position. As the Court stated in *Dandridge* v. *Williams*, 397 U.S. 471, 479 (1970):

> "Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family."

Ohio is in the same position here, particularly during this period of continuing economic recession. Ohio cannot reduce the level of compensation without denying all claimants sufficient support. Thus, Ohio cannot expand its fund except by raising the tax on employers. Such a raise may well be counterproductive for marginal employers whose business could not afford increased taxation. This, in turn, would reduce available jobs and limit economic growth toward additional jobs, thereby increasing demands upon Ohio's unemployment fund.

Last term the Court held that the city of Charlotte could properly decline to withhold dues for city employees who were union members even when the city withheld amounts for other organizations. *City of Charlotte* v. *Firefighters*, 426 U.S. 283 (1976). The court without dissent upheld the city's decision over challenge under the Equal Protection Clause for the sole reason that the evidence showed "that it would be unduly burdensome and expensive for it to withhold money for every organization or person that requested it . . ." 426 U.S. at 287. Similarly, here Ohio, consistent with the limited purpose of the Social Security Act, must take in account the actual resources of its fund in order to meet the rising burden of those without jobs, imposed by the nation's continuing economic instability. See Manpower Admin. U.S. Debt of Labor Comparison of State Unemployment Ins. Laws (3d rev. ed. Sept. 1, 1973).[9]

[9] This case raises a substantial and significant "case and controversy" within the scope of Article III of the U.S. Constitution notwithstanding the December, 1975 Amendment to the Ohio Unemployment Compensation Act. North Carolina's disqualification provision parallels Ohio's and because of rising demands from the nation's unemployed other jurisdictions may well be eager to follow the lead of these two states if such provisions are beyond constitutional challenge.

E. Disqualification Based Upon Fault or No Fault Does Not Violate Either the Equal Protection or Due Process Clause of the United States Constitution.

The basic principles set forth by this court in *Chas. C. Steward Mach. Co., supra,* and *Carmichael* v. *Southern Coal & Coke Co., supra,* relating to classifications are equally as sound today as they were in 1935. The subject matter of taxation and the distribution of the benefits are a function of the legislature. It is the responsibility of the legislature to determine the local needs and general welfare of their constituency and a classification should be upheld whenever possible by the courts. Appellants agree that in the judicial process of construing legislation the courts take a long look at the purposes to be accomplished. The Congress, using the English Act of 1911 as a guide, passed the Federal Social Security Act of 1935.

One of its major purposes was to give aid, to be administered under State law through State agencies, to those out of work through no fault of their own when unemployment was due to 'fluctuations in trade'. Nebraska Law Review, Vol. 37, No. 4, June 1958.

Both the Federal and State Acts were passed at a time when the country appeared to be in the initial stages of recovery from a disastrous depression. The intent was to accumulate, by Federal and State employers tax, an insurance fund which in time of need would tide over workers temporarily laid off because work was not available. At the time the Act was passed, it is doubtful that employers contemplated their tax monies would be used to encourage any work stoppage resulting from a labor dispute. It is also doubtful, in all probability, that the framers of the Act or the States themselves projected their vision into the future so as to foresee a work stoppage by a few specialists in a multi-plant functionally integrated with other units that could affect the jobs of hundreds or thousands as a result of a labor dispute at one or more of the dependent

subsidiaries. *Abernathy* v. *Eastern Airlines*, (1963) 259 N.C. 190, 130 S.E. 2d 292 Cert. denied U.S. Sup. Ct. 375 U.S. 161 (1963). Neither was it contemplated that the insurance fund could be depleted by workers who were not actually participating in the strike but were out of work as a result of that strike.

The background of Labor dispute disqualifications was discussed in *Nebraska Law Review*, Vol. 37, No. 4, supra, which contained the following:

> "(1) It was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes, because it was feared that if benefits were available to all workers unemployed as a result of a trade dispute, they would be encouraged to suspend work in furtherance of their position in the dispute, thereby imposing an unfair burden upon the employer, and working injury upon the national economy and upon the public at large; (2) because there had been no previous experience it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating the primary purpose for which the fund was created—the payment of benefits when unemployment was due to 'fluctuations in trade.' "

Further support for Appellant's proposition that the purpose of the Social Security Act of 1935 was primarily concerned with loss of business not the paying out of benefits to those out of work due to a labor dispute can be found in this court's opinion in *Carmichael* v. *Southern Coal & Coke Co., supra*, at 515:

> "Detailed accounts of the problem and its social and economic consequences, to be found in public reports of the expenditure of relief funds, and in studies of many observers, afford a basis for the legislative judgment. It suffices to say that they show that unemployment apparently has become a permanent incident of our industrial system; that it varies, in extent and intensity, with fluctuations in the volume of seasonal business and with the business cycle. It is dependent, with special and unpredictable manifestations, upon technological changes and advances in methods of manufacturing, upon changing demands for manufactured products—dictated by changes in fashion or the creation of desirable substitutes, and upon the establishment of new sources of competition."

From the above language it is apparent that unemployment as a result in "fluctuations in trade" was an evil that was everyone's concern in 1935. There is no reference to labor disputes as a cause of unemployment. The concern was that during the depression there were no jobs and the unemployed needed help. The states enacted statutes expressly prohibiting payment of benefits to those unemployed due to a labor dispute. The reasons vary—(1) State neutrality (2) Preservation of the Fund (3) In order not to finance a labor dispute (4) A worker is not unemployed as a result of a labor dispute (5) Protect an employer from having to finance a strike against himself (6) The possibility of prolonging the strike—the list goes into infinity. The Illinois Court in *Buchholz* v. *Cummings*, (1955) 6 Ill. 2d 382, 128 N.E. 2d 900 pointed out that by the labor dispute disqualification provision of their statute, the Illinois legislature adopted the policy that the state should not, by payment of unemployment compensation, assist one party to a labor dispute, *regardless of fault*, and the state should not take sides but remain neutral, even though the court recognized that the labor dispute clause was a departure from the general idea of relief from involuntary unemployment.

In *Kelly* v. *Catherwood*, (1969) 33 App. Div. 2d 830, NY 2d 741, affd 29 NY 877, 328 NYS 2d 442, N.E. 2d 649, the court not only pointed out the states interest of neutrality, but to avoid the imputation that a strike may be financed through unemployment insurance, noting that benefits were paid from funds which were derived solely from employer contributions and that to require employers to subsidize wages lost by employees who were on strike or who had been locked out would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depended. See also *Marathon Electric Mfg. Corp.* v.

Industrial Comm. (1955) 269 Wis. 394, 69 NW 2d 573, reh. den. 269 Wis. 411, 70 NW 2d 576. This Court held in *Carmichael* v. *Southern Coal & Coke Co., supra,* 301 U.S. at 518 (14) that the Alabama Unemployment Compensation Act of 1936 was constitutional even though it was not limited to indigents or because it extended to some less deserving than others, such as those *discharged for misconduct.* Fault was an issue since plaintiffs believed that the Alabama law allowing benefits to those that became unemployed through their own misdeeds was not for a public purpose, hence unconstitutional.

Recognizing that the general purpose of the unemployment compensation statutes were designed to relieve involuntary unemployment, Appellants point out that there are other disqualifications based upon no fault. Claimants performing jury duty were held not available for work and were denied benefits. *Sincerbox, In re,* 24 App. Div. 811 (14), 263 N.Y.S. (2d) 907 (1965); *Messenger* v. *Administrator,* Judgment of the Superior Ct. Hartford County, No. 100225, Dec. 30, 1954, 3 CCH, Unemp. Insurance Reports, Connecticut—New Matters, 1952-1965 Transfer Binder, 10,680. Many states disqualify benefits to those workers who become unemployed due to an illness or injury serious enough to cause a lay-off. *Wolpers* v. *UCC,* 353 Mo. 1067, 186 S.W. 2d, 440 (1945); *State of W. Va.* v. *Hix,* 132 W. Va. 516, 54 S.E. 2d 198 (1949); *D'Yantone* v. *Bd. of Rev.,* 159 Pa. Super. 15, 46 A. 2d 525 (1946). Pregnancy which results in unemployment is held a withdrawal from the labor market. *Flannick* v. *Bd. of Rev.,* 168 Pa. Super. 606, 82 A. 2d 671 (1951); *O'Neil, In re,* 30 App. Div. (2d) 1012 (26), 294 N.Y.S. 2d 207 (1968). A claimant whose physical condition prevented her from riding on buses or subways was considered unavailable because of the limitation on opportunities to obtain employment. *In re Fico,* 29 App. Div. 1011 (12), 289 N.Y.S. 2d 249 (1958). Moving to an area of high unemployment disqualifies a claimant from receiving benefits. *Wadlington* v. *Mindes, et al.,* 4 CCH —Unemployment Insurance Reports, Illinois—New Matters, 10,653 (1970)

Other disqualifications arise from refusal to work a particular shift, travel, unavailable for work due to lack of transportation, leaving employment because of family or marital reasons, illness in the family, spouse involuntarily leaving work because her husband was transferred, refusal to work on a particular day for religious reasons and in some cases refusing to accept work due to lower wages. The above disqualifications are just a few of the cases where involuntary employment results in a denial of benefits. Each state has specific laws with various disqualifying provisions. The most that can be said on the subject is that there is no federal law that sets forth the limits that a state legislature may place on the payment of benefits or the requirements the legislature places on eligibility. The no-fault provision in the Ohio law is constitutional and is within the police power of the State.

F. Preservation of the State Unemployment Account is Required by the Social Security Act.

Under 26 U.S.C., Section 3302, the state is obligated to maintain sufficient funds to administer the Unemployment Compensation Program. If the fund is depleted and it becomes necessary to borrow from the Federal Reserve Account, repayment must be made within three years or the state employers subject to FUTA are subject to a reduction of credit towards the state tax up to 15 per cent. The Secretary of Labor, pursuant to Public Law 94-45, Title I, Section 110 (G) (1) may render that subsection inapplicable if he is satisfied that the state has taken adequate steps to ensure the restoration of fiscal soundness of the State Fund. The Section governing repayment of loans is quoted in pertinent part below:

> "Sec. 110. (b) (1) the amendment made by subsection (a), shall not be applicable in the case of any State unless the Secretary of Labor finds that such State has studied and taken appropriate action with respect to the financing of its unemployment programs so as substantially to accomplish the purpose of restoring the fiscal soundness of

> the State's unemployment account in the Unemployment Trust Fund and permitting the repayment within a reasonable time of any advances made to such account under title XII of the Social Security Act. For purposes of the preceding sentence, appropriate action with respect to the financing of a State's unemployment programs means an increase in the State's unemployment tax rate, an increase in the State's unemployment tax base, a change in the experience rating formulas, or a combination thereof."

As seen in the above Section, the states by appropriate action must (1) increase the state tax rate on the employer, (2) increase the tax base, (3) change the employer's experience rating or (4) any combination of the above.

It seems incongruous to Appellants that the Federal Government could mandate the State to maintain a sound fiscal policy and also dictate who shall be eligible for benefits under a state unemployment plan as suggested by Appellees.

The State has an additional interest in preserving the fund in that the capital improvement funds cannot be used for expansion and building new local offices as required to meet the needs of its citizens if the state is reduced to borrowing from the Federal Reserve fund. Ohio expansion plans presently being developed calls for thirteen new claims offices to be constructed in the near future.

G. State Substantive Law Required that U.S. Steel and Republic Steel be Made Parties.

As this court is well aware, the decision of *Erie Railroad Co.* v. *Tompkins*, 58 S. Ct. 817, 304 U.S. 64 (1938) stands for the proposition that federal courts must apply the same rules of substantive law as the state courts of the state in which the district court is sitting. In the instant case, the three-judge district court failed to do so.

Not only did the three-judge district court fail to apply the substantive law of the state of Ohio with respect to Section 4141.29 (d)(1)(a) but the lower court ignored the fact that the state of Ohio may, for purposes of its state unemployment programs, determine who shall be a party necessary for complete litigation of an unemployment claim.

Rule 19(a) of the Federal Rules of Civil Procedure states:

> "(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be* joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, *the court shall order that he be made a party.* If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action." (Emphasis added)

In the instant case, the failure to join U.S. Steel and Republic Steel might well mean that any judgment rendered in this case will not bind them. This could mean that subsequent suits could follow involving these employers should it be deemed necessary to debit their Unemployment Insurance accounts for benefit payments.

So strong is the necessity for joining the employer in a legal action for unemployment benefits that it has been statutorily defined by the General Assembly of Ohio. Although Section 4141.01 (I), Ohio Revised Code, uses the term "interested party" rather than necessary or indispensable party, the facts in the instant case are sufficient to trigger the operation of Rule 19(a) and (b) Federal Rules of Civil Procedure. Section 4141.01 I states:

> " 'Interested party' means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code."

Section 4141.28(E)(3) of the Revised Code states:

"(3) The administrator on receipt of such eligibility notice shall determine whether such notice was timely filed and whether it contains specific facts which would affect the claimant's eligibility for benefits for the week in question and for subsequent weeks to which the same eligibility issue applies. In the event both such determinations are in the affirmative and unless a prior determination on the same eligibility issue has become final, *the employer shall become an interested party* with respect to such week or weeks. In such event the administrator or his deputy shall consider such information, together with other facts found by him and, *after giving notice to the interested parties* and informing them of their right to be present at a pre-determination fact-finding interview, conducted as described in division (B) of this section, shall determine whether such claim shall be allowed, and shall mail notice of such determination to the notifying employer and to the claimant. If the determination disallows benefits for any week in question, the payment of benefits in respect to that week shall be withheld pending further appeal." (Emphasis added)

Thus, under the substantive law of Ohio, a claimant's employer, in this case, U.S. Steel or Republic Steel, is, for purposes of litigation, an indispensable party on a par with the Administrator of the Ohio Bureau of Employment Services, and the defect of failing to join them is so basic that it may be raised even at this point. In *McShan* v. *Sherill,* 283 F. 2d 462, 464 (C.A. 9th, 1960), the defendant-appellants did not complain of the plaintiff-appellees' failure to join a party until *after* the trial. The Appellate Court, in remanding to the district court, stated:

> "Appellees complain of appellants' delay in raising the objection (to lack of joinder) and the nature of the evidence supporting it. The absence of indispensable parties can be raised at any time, however, even by the appellate court on its own motion."[10]

---

[10] For additional authority, see 3A J. Moore, Federal Practice, par. 19.19 at 2582 n. 10, 11.

H. The Workers Here in Issue Would be Disqualified Under the Present Ohio Law and Under the Laws of Other States.

As this court is well aware, Section 4141.29(D)(1)(a) was amended effective 2/7/75 to read:

> "(D) Notwithstanding division (A) of this section, no individuals may serve a waiting period or be paid benefits under the following conditions:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemploymnet was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE, OR; (ii) his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, *unless his employer is a wholly owned subsidiary of the employer engaged in the dispute,* or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits." (Emphasis added)

Thus, even under the present law there exists a doubt that Appellee herein would be entitled to benefits. The above quoted Amendment provides that workers would be disqualified from benefits if they were employed in a wholly owned subsidiary of the employer engaged in the dispute, even though they are not financing, participating in, or directly interested in such labor dispute. The amendment to Section 4141.29 (D)(1)(a) thus changes nothing and indicates no shift in the thinking of the Ohio General Assembly on these facts.

Further, the workers in this case would be disqualified in other states, had they been employed there, in spite of the fact that other states may not have a provision identical to Ohio's. Examples of this can be found as in *Mountain States Tel. & Tel. Co.* v. *Sakrison* (1950) 71 Ariz. 219, 225 P. 2d 707 wherein all facilities in and out of the State were considered one facility and benefits were denied to all employees. In *Re Persons Employed by St. Paul & T. Lumber Co.* (1941) 7 Wash. 2d 580, 110 P. 2d 877, the court denied benefits to employees of a subcontractor who had to lay off his employees due to a strike of his principle even though the sub-contractor's employees were not participating, financing or interested in the labot dispute and were not employees of the struck employer. (See also *Local Union No. 11* v. *Gordon* (1947) 396 Ill. 293, 71 N.E. 2d 637). In *Bonaventura* v. Catherwood (1969) 32 App. Div. 2d, (NY) 869, 301 NYS 2d 229 truck drivers for a construction contractor were denied benefits because the contractor's operating engineers were on strike. This was because the New York statute covered unemployment resulting from a strike or other industrial controversy, regardless of the claimants' individual participation, financing, aid, or interest in the outcome.

Appellees do not point out that, even in the states that allow benefits in various forms of labor disputes, nearly every state has some sort of disqualification in the waiting weeks which vary from one to nine weeks or more. In these cases, many employees never receive benefits because, in many cases,

the strike is over before the State pays out benefits. This is just another method of preserving their funds; another variation on the theme of disqualifications under the various state laws. Thus, the questions raised by this appeal are ripe, justiciable and not moot.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decision of the three judge district court or, in the alternative, that this Honorable Court reverse the decision of the three judge district court and remand this action for further evidentiary hearings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,
v.
LEONARD PAUL HODORY,
Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

NO. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants

v.

LEONARD PAUL HODORY,
Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

United States Steel Corporation respectfully moves for leave to file a brief *amicus curiae*. Appellants have consented to the filing of such a brief. Appellee has not.

United States Steel Corporation had no knowledge of the existence of this litigation until the three-Judge panel's decision was reported in various newspapers. On April 28, 1976, it filed a motion to intervene in the United States District Court which was denied on May 26, 1976 on the grounds that United States Steel Corporation had adequate notification about the case from the newspapers and on the grounds that the district court lacked jurisdiction to entertain the motion since an appeal had been taken. A similar motion to intervene was filed before this court but was denied on October 4, 1976. Therefore, a brief *amicus curiae* is the only way United States Steel Corporation now can be heard.

The order of the three-Judge panel in this case requires the Ohio Bureau of Employment Services to pay unemployment compensation benefits to plaintiff Hodory, an employee of United States Steel Corporation, and several hundred other of its employees as the members of a class.

United States Steel Corporation, a Delaware Corporation with about 17,000 employees located in Ohio, is subject to and is in full compliance with the Ohio Unemployment Compensation Act.

Under the provisions of the Ohio Unemployment Compensation Act which establishes a merit rating system for the payment of contributions by Ohio employers, United States Steel Corporation in effect will pay the benefits ordered to be paid—approximately $316,000. See Section 4141.25 of the Revised Code of Ohio.

Further, under Ohio law, United States Steel Corporation is an interested party. It is entitled to notice of proceedings before the state unemployment compensation agency which involve its employees and the potential charges against it for payment of benefits to such employees. It has certain appeal rights which it exercised on the claims at issue here which were allowed by the Ohio agency. See Sections 4141.01(I) and 4141.28 of the Revised Code of Ohio. These appeals are still pending before the Ohio Board of Review awaiting the final order in this case before being processed further. Also, there are other claims by employees of United States Steel Corporation which were denied by the Ohio agency and which also would be affected by the order of the three-Judge panel in the event it becomes final.

The proprietary interest of United States Steel Corporation in the Ohio unemployment compensation fund is substantial and it should be heard in this case. See *Carnegie-Illinois Steel Corporation v. Review Board,* 117 Ind. App. 379, 72 N.E. 2d 662 (1947). Carnegie-Illinois Steel Corporation is now a part of United States Steel Corporation.

The interests of United States Steel Corporation are not adequately represented by the appellants. The interests of the appellants are to see that the laws of the State of Ohio are enforced. They have no particular interest in whether or not the employees of United States Steel Corporation receive benefits. *Trbovich v. United Mine Workers,* 404 N.S. 528, 538-9 (1972), has established the principle that a governmental agency cannot adequately represent the interest of a private party. It is only by coincidence that the appellants are to be considered generally on the same side of the issues herein as United States Steel Corporation.

Accordingly, we respectfully request that the Court grant United States Steel Corporation's motion for leave to file the brief *amicus curiae* which is attached hereto.

.....

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OPINION AND ORDER BELOW

The three-judge Court's Memorandum Opinion and Order issued March 4, 1976, which were issued without notice to United States Steel Corporation, is attached hereto. [See Appendix] It is printed at 408 F.Supp. 1016 (N.D. Ohio, 1976).

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under 28 U.S.C. §1253 which provides for direct appeal to this Court from an order of a three-judge District Court granting or denying an interlocutory or permanent injunction.

STATUTE INVOLVED

Section 4141.29 (D) (1) (a) of the Revised Code of Ohio read as follows at the time this action arose:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged

in the dispute, or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

Section 1 of The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS FOR REVIEW

1. Did the court below err in finding that Ohio Revised Code §4141.29(D)(1)(a) violates the Equal Protection Clause of the Fourteenth Amendment?

2. Did the court below err in finding that Ohio Revised Code §4141.29(D)(1)(a) violated the Due Process Clause of the Fourteenth Amendment?

HISTORY OF THE CASE

This is an action by Leonard Paul Hodory against the Ohio Bureau of Employment Services, for its refusal to pay unemployment compensation benefits to him. Plaintiff (Appellee herein) Hodory became unemployed from the United States Steel Corporation, Ohio Works, on November 12, 1974 because of a nation-wide strike by the United Mine Workers affecting, in Ohio, U. S. Steel and the Republic Steel Corporation. Plaintiff applied for unemployment compensation benefits the following day and was later notified by the Ohio Bureau of Employment Services that he was ineligible for benefits because he was unemployed as a result of a labor dispute involving his employer. ORC 4141.29(D)(1)(a)

Plaintiff brought this action in federal court pursuant to 42 U.S.C. §1983 seeking (1) an injunction against the enforcement of the statute, (2) a declaration that it was unconstitutional, and (3) past benefits for himself and the class he purported to represent, viz, 1250 other U. S. Steel or Republic Steelworkers, unemployed in Ohio because of the United Mine Workers strike against those two companies.

The three-judge district court,

(1) granted class certification

(2) enjoined enforcement of the statute

(3) held the labor dispute provisions unconstitutional

(4) ordered the defendant Ohio Bureau of Employment Services to pay unemployment compensation benefits to those denied benefits solely because of ORC 4141.29(D)(1)(a).

The defendant appealed to the Supreme Court of the United States.

ARGUMENT

I. Judicial and Administrative Precedent Indicate That the Court Erred in Deciding That the Ohio Labor Dispute Provision Violated the Fourteenth Amendment Because It Disqualified From Unemployment Compensation Individuals Who Were Not Voluntary Participants in a Labor Dispute.

Since the beginning of the unemployment compensation program of the United States, approximately forty years ago, there has been very little dispute concerning the power of a state to adopt a strike disqualification provision which had the effect of denying unemployment compensation to individuals who were not voluntary participants in a labor dispute which caused their unemployment. As will be noted herein, that power has been tested in this Court but never successfully. The decision of the Court below is a substantial departure from established law and it has opened many questions such as how far a Federal district court may go in deciding issues in state unemployment compensation cases before that state's courts have had an opportunity to act on the facts of the case; how far a Federal district court may go in requiring an employer to pay into a fund from which benefits are paid to those of its employees who lose work because of a labor dispute in which their employer is involved; how far a Federal district court may go in deciding issues in an unemployment compensation case without notice to the employer to whom benefits will be charged; and what a state *cannot* do to protect its fund from large and sudden withdrawals unrelated to fluctuations in business condition.

A. THE CARMICHAEL AND CHAMBERLIN CASES.

This Court has already approved a labor dispute disqualification which disqualified from unemployment compensation individuals who were unemployed as a result of a labor dispute in which they were not voluntary participants. See *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 57 S.Ct. 868, 81 L. Ed. 1245 (1937), *Chamberlin v. Andrews,* 299 U.S. 515, 81 L. Ed. 380, 57 S.Ct. 122 (1936).

The Alabama unemployment compensation statute (General Statutes of Alabama, 1935, No. 447, enacted September 14, 1935) involved in *Carmichael, supra,* provided: "Section 6. Benefit Eligibility Conditions * * * (d) during trade disputes, an employee shall not be eligible for benefits in any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was employed." *There was no exception.* Obviously, this statute disqualified individuals whether or not they were voluntary participants in such dispute or innocent bystanders whose employment was interrupted by the occurrence of the labor dispute. The constitutionality of this statute was upheld in *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 81 L. Ed. 1245, 57 S.Ct. 868 (1937). In that case, there was a long opinion by Justice Stone in which he discussed the merits of the statute and of the attacks on it. The opinion deals definitely with the validity of the classifications and exemptions contained in the statute and holds that they were reasonable. The court said,

> "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny, *they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. . . .*" (Emphasis added) (at 509)
>
> "What we have said as to the validity of the choice of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. . . ." (at 513)

The New York statute involved in *Chamberlin* said: (*Laws of New York,* 1935, Vol. 1, p. 1033, Sec. 504) "Waiting Period. (1)" (This provided a waiting period for everyone of three weeks) beginning "(2) An employee shall not be entitled to benefits except for unemployment which continues subsequent to a waiting period of ten weeks . . .(b) if he has lost his employment because of a strike, lockout, or industrial controversy in the establishment in which he is employed." *There was no exception* for employees whose unemployment resulted from a labor dispute but who were not voluntary participants in such dispute. Again, the constitutionality of this statute was upheld in *Chamberlin v. Andrews,* 299 U.S. 515, 81 L.Ed. 380, 57 S.Ct. 122. (1936)

B. THE ABERNATHY CASE.

Denial of unemployment compensation to employees not voluntarily participating in a labor dispute was specifically upheld *In re J. K. Abernathy,* 259 N.C. 190, 130 S.E. 2d 292 (1963), cert. denied 375 U.S. 181 (1963), which is directly identical to the case now before the Court in several respects. The North Carolina statute

involved in that case was Section 96-14(4) of the General Statute of North Carolina, 1963. It read as follows:

> "An individual shall be disqualified for benefits:
>
> (4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed . . . ."

We quote again from the Ohio statute to show its similarity to the North Carolina statute:

> ". . . no individual may serve a waiting period or be paid benefits under the following condition:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemployment was due to a labor dispute . . . at any factory, establishment or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed and for so long as his unemployment is due to such labor dispute. . . ."

It is clear that in both *In re J. K. Abernathy* and the case now before this Court that:

(a) the state statute disqualified claimants not on strike who lost their employment because of a strike in another state by a union to which they did not belong, and

(b) the disqualification disqualified individuals otherwise eligible and qualified who were *involuntarily* unemployed due to a labor dispute.

The North Carolina labor dispute provision was attacked as violating the equal protection clause of the Fourteenth Amendment.

The Supreme Court of North Carolina upheld the constitutionality of the North Carolina statute. It directed much of its opinion to the purpose of unemployment compensation and its early history, both in England and in the United States, to show that the fundamental purpose of the labor dispute disqualification in the state laws is twofold: (1) to maintain a state's neutrality in labor management relations and (2) to prevent severe drains upon the insurance fund. The court quoted with approval from the Nebraska Law Review, Vol. 37, No. 4 of June, 1958 as follows:

> "Because there had been no previous experience [in England] it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating *the primary purpose for* which *the fund* was created—the *payment of benefits when unemployment was due to 'fluctuations in trade.'*" [Underscoring supplied]

See *Huges, Principles Underlying Labor Dispute Disqualification,* 1946.

In discussing the constitutionality of the North Carolina labor dispute provision, the North Carolina court pointed out that the unemployment compensation laws of most states contained a labor dispute disqualification of some nature and ruled that the broader disqualification contained in the North Carolina statute ". . . involves a question of degree and not of principle." (Appendix, p. 53) It then went on to uphold the constitutionality of the statute, stating " 'When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts' judgment but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome.' *Sproles v. Binford,* 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167 . . . ." (1932) (Appendix, pp. 52-53)

C. Legislative and Administrative Precedent.

The Social Security Act (Act of August 14, 1935, ch. 531, 49 Stat. 620, as amended, 42 U.S.C. § 301 et seq., 1970) established a system administered on a state-by-state basis with some federal financing from the collection of an excise tax on employers. The states were permitted to collect an additional tax from employers whose employees collected more than a given amount of benefits. To assist the states in drafting legislation to implement the unemployment compensation system, the Social Security Board, which was created as a general advisory council on social security, composed several model bills. The bills were based in large part on the British experience in administering unemployment insurance. See Shadur, "Unemployment Benefits and the Labor Dispute Disqualification," 17 U. Chi. L. Rev. 294, 294-95 (1950). The model bill adopted in most states contained

a provision which served to disqualify workers whose unemployment was "due to a stoppage of work which exists because of a labor dispute." The bill provided, in part:

> An individual shall be disqualified for benefits . . . for any week with respect to which the commissioner finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown to the satisfaction of the commissioner that—
>
> (1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> (2) He does not belong to a grade or class of workers of which, immediately before commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;
>
> Provided, That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment, or other premises. (Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types § 1(5) (1936).)

The advice of the Social Security Board was not followed by all the states. Many states followed the lead of Wisconsin which had enacted the Wisconsin Employment Reserves Act of 1932, before enactment of the Federal law. That Wisconsin Act disqualified in the following way:

> "An employee who left (. . . or lost) his employment with an employer because of a strike or other bona fide labor dispute is not eligible for benefits . . . for any week in which the strike or labor dispute is in active progress. . . ."

Employees who lost work regardless of fault, and regardless of their lack of interest in the labor dispute were disqualified in Wisconsin and also in those states which patterned their strike disqualification after that of Wisconsin. Some states borrowed labor dispute disqualification language from Wisconsin and at the same time borrowed some of the language of the Social Security Administration. It is impossible to classify all the state labor dispute disqualifications and say that any two are identical. However, all of them including the North Carolina statute involved in *Abernathy, supra,* and the Ohio statute involved in the instant case were approved by the Social Security Board as conforming to the requirements of the Social Security Act.

In summary, then, labor dispute disqualification provisions which violated the "fault" principle have been approved by this Court and by the Social Security Board and a labor dispute disqualification provision identical with the instant one was specifically upheld by the North Carolina Supreme Court in face of a constitutional attack. The decision of the lower court, which ignored the above precedents, is clearly erroneous and should be reversed.

II. The Ohio Labor Dispute Provision Does Not Violate the Equal Protection Clause of the Fourteenth Amendment, Because It Makes a Permissible Classification That Is Justified by a Legitimate State Interest.

The State of Ohio has a legitimate governmental interest in making the distinction between those unemployed because of a labor dispute although they themselves are not involved, and those unemployed because of general lack of work not brought about by labor disputes.

A. Financial Basis For Classification.

The first and most obvious governmental interest served by ORS 4141.29(D)(1)(a) is protection of the fiscal integrity of the state unemployment compensation fund. See Pribram, "Compensation for Unemployment during Industrial Disputes," 51 Monthly Lab. Rev. 1375, 1376 (1940). In the *Abernathy* case, for example, the number of possible unemployment compensation claimants and accordingly, the potential drain on the state fund, was enormous—$1 million per week. In the instant case, the unemployment compensation benefits claimed by the plaintiff class amounted to approximately $316,000.00. Ohio sought to protect its unemployment compensation fund from certain large and sudden withdrawals by enacting the statute which the lower court here has declared unconstitutional. This Ohio statute, together with other provisions of the Ohio unemployment compensation law less generous than similar provisions of other states, has enabled Ohio to maintain a solvent fund during recent periods of high unemployment. Ohio's balance in its unemployment compensation

fund was $295,520,688.75 as of December 31, 1975. Those other states and jurisdictions which followed a more generous policy of benefit payments and were forced to borrow from the federal government numbered twenty-one as of October 15, 1976 and the total amount of their borrowings as of October 15, 1976 was $3,208,032,-294.52. Approximately $2.9 billion of this amount has been borrowed from Federal general revenue funds. (United States Department of Labor, Unemployment Insurance Service, Employment and Training Administration.) Clearly, the interest of the state in preserving the fiscal integrity of the fund justifies the classification created by this labor dispute disqualification provision.

B. Labor Policy Basis for Classification.

A second legitimate governmental interest served by ORS 4141.29(D)(1)(a) is the preservation of a governmental neutrality in a labor dispute. It is clear that any governmental action which increases or decreases the cost of a labor dispute to one side or the other affects the bargaining position of both parties and the ultimate outcome of the labor dispute. See J. T. Carney, "The Forgotten Man on the Welfare Roll: A Study of Public Subsidies for Strikers," 1973 Washington L.Q. 469, 527-534 (1973).

Obviously, payment of unemployment compensation to strikers decreases the cost to them of their participation in the strike while at the same time increasing the employer's cost of resisting the strike, since the employer will ultimately be charged by the state with the costs of such benefits. Payment of unemployment compensation to employees laid off by reason of the strike but not participating therein does not decrease the cost

of the strike to the participants but it does increase the cost of resisting the strike to the employer and thereby affects the bargaining power of the employer and the ultimate outcome of the strike. Now, one of the three bases for the normal strike disqualification (which is directed more at the first situation than the second)—is the "neutrality" principle—the principle that the state should not intervene in a labor dispute to assist either party gain its economic ends. See Carney, supra, 497. It is clear that the neutrality principle is better served by the broad based labor dispute disqualification contained in the Ohio statute than by the more usual labor dispute disqualification contained in some other state unemployment compensation laws since the Ohio labor dispute disqualification precludes the imposition of any financial penalty on an employer who is forced to lay off workers because others of the employer's employees are engaged in a labor dispute. The state's interest in remaining neutral in labor disputes justifies the classification contained in the Ohio unemployment compensation law.

It is clear that Ohio has a right to enact legislation to protect those legitimate interests. See *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970) where the Supreme Court upheld a provision of a Maryland Aid to Families with Dependent Children Act, which put a ceiling of $250 per month on welfare benefits no matter how many children were in the family. Since the statute provided for an additional monthly benefit for each child until the $250 level per month was reached, the plaintiffs in that case claimed a denial of equal protection by this classification. The court held the Maryland provision did not violate the equal protection clause of the Fourteenth Amendment, because the states are al-

lowed considerable latitude in putting into effect their welfare legislation. The Court there said, "In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classification made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution merely because the classification is not made with mathematical nicety or because in practice it results in some inequality." (at 485) (citations omitted) The Court went on to say that the federal courts have no power to impose their view of wise social policy upon the states under the Fourteenth Amendment, and that the deference given the state in this situation is such that if any reasonable set of circumstances could be conceived to warrant the classification, then it will not be set aside. Here, the *Abernathy* circumstances are those which would immediately warrant the distinction made by the State of Ohio. ORS 4141.29(D)(1)(a) is a legitimate attempt by the state to avoid placing a burden on the struck employers, and to prevent its own unemployment compensation fund from being depleted by labor disputes. In striking down the classification on equal protection grounds, the Court below sought to implement its own preconceived notions of social policy, ignoring completely the admonitions of this Court in *Dandridge*. "The entractable social, economic and even philosophical problems presented by public welfare assistance programs are not the business of the court . . . the Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." (at 487) Accordingly, the decision of the court below should be reversed.

III. The Ohio Labor Dispute Provision Does Not Violate the Due Process Clause of the Fourteenth Amendment.

One of the grounds on which the three-judge district court invalidated the Ohio statute was that it violated the due process clause of the Fourteenth Amendment by disqualifying from unemployment compensation benefits employees who were unemployed through no fault of their own, and who never participated or benefited from the labor dispute between their employer and other employees. The court ruled that the state had no interest in denying unemployment compensation to such employees who were laid off through no "fault" of their own. As has been pointed out before, the State has legitimate interests in disqualifying the plaintiff and his fellow class members from receiving unemployment compensation. It is also clear that the "fault" concept is not required by the due process clause. The Ohio statute is not alone in denying unemployment compensation benefits to those laid off through no fault or participation of their own. All states put limits on the number of weeks one may receive unemployment compensation benefits, although no fault is attributed to recipients. The legislation of such states simply decided that there should be a limit on the number of weeks one may receive unemployment compensation benefits, no matter what one's status at the end of that period. Similarly, many states have labor dispute provisions which violate the "fault" principle invoked by the court below. In New York State and Rhode Island unemployment compensation benefits are denied for seven weeks to anyone who is unemployed by reason of a labor dispute. New York Labor Law Section 592, Rhode Island

General Laws, An. 28-44, 46 (1967). After the expiration of the seven-week period, all employees, including strikers, receive unemployment compensation benefits, even if they were financing or had an interest in the dispute. The New York and Rhode Island provision denying benefits to all unemployed by reason of a labor dispute for seven weeks clearly violates the fault principle. (At one time, the New York type provision was included in the unemployment compensation laws of Alaska, Louisiana, Tennessee, and Pennsylvania. See Carney, *supra,* 498.)

Indeed, even the more traditional labor dispute disqualification provision based on the model act's suggested language can result in vicarious disqualification in contravention of the "fault" principle. Thus an employee who is laid off as a result of a labor dispute in which he is interested or which he may be financing (through the payment of union dues) may be disqualified from unemployment compensation even though it would be difficult to say that his unemployment is due to some "fault" or "action" on his part. It is even questionable if disqualification of all participants in a labor dispute is consistent with the "fault" principle. Many individuals who engage in a strike or who honor a picket line do not do so of their own free choice. They may be reluctant strikers who are not permitted to work by their employers who could not operate when a majority of employees are on strike or who dare not return to work during the strike because of fear of violence from their fellows or fines from the union for crossing a picket line. Strict adherence to the "fault" principle would require the unemployment compensation authorities to poll all those involved in a labor dispute to determine whether or not they were voluntary participants in the same so

the unemployment compensation could then be paid to the unwilling but not the willing.

Under the Ohio law as amended, effective December 2, 1975, allowing for the payment of benefits to certain claimants not participating in and not interested in the labor dispute, it is clear that in a factory where members of several unions are employed and one union of four boilerhouse workers, for example, shuts down the entire plant, those members of the other unions who lose their work are disqualified. Although the three-judge opinion below speaks approvingly of the new Ohio law, the principles of the *Hodory* opinion would invalidate the new Ohio labor dispute disqualification because it denies benefits to some who are *involuntarily* unemployed. It would appear from Footnote 5 (Appendix, p. 35) that the three-judge panel was unaware that individuals *involuntarily* unemployed would be denied benefits under Ohio's labor dispute provision as amended effective December 2, 1975.

The thrust of the reasoning in the opinion of the three-judge Court is that the claimants in a labor dispute situation are entitled to benefits if they can show that they are unemployed without "some fault of their own" as is specified in the voluntary leaving, refusal to work and other disqualifications. If such

> "contention finally prevails, there will be, in effect, no labor dispute disqualification at all since all determinations in such situations can be made under other clauses without reference to the labor dispute provision." *Hughes, Principles Underlying Labor Dispute Disqualification,* p. 5.

It should be clear, therefore, that being unemployed involuntarily is not the only test for the payment of

benefits to those otherwise eligible and qualified. There are instances where other considerations become controlling as when a state decides what it must do in order to protect its fund or to maintain its neutrality in the case of labor dispute situations.

In ruling that the Ohio labor dispute disqualification violated the due process clause of the Fourteenth Amendment, the court below dredged from the dank and dark dungeon of the "1930's" the hoary ghost of "substantive" due process—a concept which was used then and is used by the court below to write its own concept of social policy into law. It is clear that the key to the opinion of the court below in this case is the conviction of the individual members of that court that it is unfair to deny unemployment compensation to the plaintiffs in the instant case. One can agree or disagree with the sentiments of the individual judges of the court below but one must remember that they are judges—not elected legislators—. It is the responsibility of the legislature and not the courts to determine what is fair in a substantive sense. As this court declared in *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1937), "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought . . . For protection against abuses by legislatures, the people must resort to the polls, not the courts." The decision of the court below violated this principle and should be reversed.

CONCLUSION

It is submitted that Section 4141.29(D)(1)(a) of the Revised Code of Ohio is not repugnant to any law of the United States and that it meets all of the requirements of the Fourteenth Amendment of the United States Constitution.

It is further submitted that the legislature of Ohio in enacting that disqualification acted reasonably and within the police powers vested in it.

For the reasons set forth in this brief, and pursuant to the cases previously decided by this Court, United States Steel Corporation submits respectfully that the decision of the three-judge District Court in this case be reversed.

Respectfully submitted,

FRANK C. MANAK
Counsel for U.S. Steel Corporation

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff
v.
OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants
} No. C 75-15 Y

Memorandum Opinion and Order

CELEBREZZE, *Circuit Judge*
LAMBROS, *District Judge*
KRUPANSKY, *District Judge*

Plaintiff, Leonard Paul Hodory (Hodory) filed the above-captioned action, pursuant to 42 U.S.C. §1983, on behalf of himself and all other persons similarly situated whose claims for unemployment benefits were denied or will be denied because of the operative effective of a labor dispute disqualification provision in §4141.29(D)(1)(a) of the Ohio Revised Code.

Hodory challenged the constitutionality of §4141.29 (D)(1)(a) on the grounds that: the provision is in conflict with §303(a)(1) of the Federal Social Security Act, 42 U.S.C. §503(a)(1) and violates the Supremacy Clause to the United States Constitution; the labor dispute disqualification contained therein denies plaintiff and the class he seeks to represent the right to equal protection of the laws, guaranteed under the 14th

Amendment to the United States Constitution; and the overbroad disqualification provision bears no real and substantial relation to the legislative purpose and constitutes a denial of due process of law guaranteed by the 14th Amendment to the United States Constitution.

Hodory requested the issuance of permanent injunctive relief to restrain the Ohio Bureau of Employment Services (Employment Bureau) and the Administrator, Albert E. Giles, from enforcing §4141.29(D)(1)(a) and a declaration that the statute is unconstitutional. In addition, plaintiff sought past unemployment benefits for himself and the class he purports to represent which he alleged were denied by virtue of the application of that statutory provision.

This matter came on for hearing before this three-judge Court on October 23, 1975. The following are the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The operative facts as set forth herein were not disputed by the parties.

Hodory was laid off from his job as a Millwright apprentice with the United States Steel Corporation (U. S. Steel), Ohio Works, in Youngstown, Ohio on November 12, 1974. He applied for unemployment benefits on November 13, 1974 and was subsequently notified by the Ohio Bureau of Employment Services (Employment Bureau) that his claim was disallowed, pursuant to §4141.29(D)(1)(a) O.R.C.

Section 4141.29(D)(1)(a) provides, in pertinent part:

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
(1) for any week with respect to which the administrator finds that:

(a) *His unemployment was due to a labor dispute* other than a lockout *at any factory, establishment, or other premises* located in this or any other state and *owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute* . . . (Emphasis added.)

It is clear that Hodory became unemployed through no fault of his own. He was one of approximately 1250 United Steelworkers who was laid off by either U.S. Steel or Republic Steel Corporation at their plants in Ohio because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two steel companies. The steelworkers were in no way involved in the disqualifying labor dispute between the coal miners and the steel companies nor did they benefit from that dispute.

Hodory was denied unemployment benefits from November of 1974 through January 11, 1975, at which time the coal miners' strike was apparently terminated. The Employment Bureau's sole basis for denying Hodory's application for weekly benefits during this period was that such benefits were barred under the labor dispute disqualification found in §4141.29(D)(1)(a) O.R.C.

Hodory has taken an administrative appeal from the decision of the Employment Bureau, which appeal

is still pending. It is being considered along with the appeals of the approximately 1250 other claimants similarly situated as a "group appeal" by the administrative Board of Review.

Hodory resumed his employment on March 30, 1975 and is presently employed.

During the pendency of this lawsuit §4141.29(D)(1)(a) O.R.C. was amended to provide, in pertinent part, that:

> . . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . .

This amendment, Am.Sub. Senate Bill 173, however did not become effective until December 2, 1975, and is not to be retroactively applied.

II. CONCLUSION OF LAW

A. *Availability of Relief in this Court*

The first issue for this Court to consider is whether, in light of the pendency of the appellate administrative proceedings, this Court is precluded from adjudicating plaintiff's claims and from issuing injunctive relief against the defendants should the Court conclude that plaintiff is entitled to such relief on the merits of his claims.

Initially, it should be noted that there is no absolute bar in this case against the issuance of injunctive relief under the provisions of 28 U.S.C. §2283, the Anti-injunction statute. *Mitchum v. Foster,* 407 U.S. 225 (1972); *Gibson v. Berryhill,* 411 U.S. 564 (1973). The Court must, nevertheless, consider the possible applicability of certain established principles of equity, comity, and federalism which would require this Court to refrain from determining the claims for injunctive relief.

The Supreme Court has recently articulated those circumstances in which such principles may suggest that a federal court refrain from exercising jurisdiction or abstain from determining claims for injunctive relief: 1) where a party has failed to exhaust available administrative remedies; 2) where a party seeks to enjoin a pending state criminal prosecution in the absence of special circumstances as set forth in *Younger v. Harris,* 401 U.S. 37 (1971); or where abstention and a stay in federal court is indicated to afford the state courts an opportunity to determine unsettled questions of state law prior to federal court intervention on the federal constitutional questions. *Gibson v. Berryhill, supra,* 411 U.S. at 573-574.

Upon due consideration, the Court concludes that the circumstances of the present case do not present a situation where dismissal or abstention would be appropriate. While clearly the plaintiff herein has not exhausted the administrative remedies which are available under Ohio law, in *Gibson,* the Supreme Court stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U.S.C. §1983. Moreover, in the instant action, exhaustion of the available ad-

ministrative remedies would in all probability prove a futile effort to vindicate plaintiff's constitutional claims in this case. Section 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits for the period he was laid off due to coal miners' strike. In addition, the Employment Bureau has denied benefits to plaintiff, as well as the 1250 United Steelworkers, who were similarly effected by the coal miners' strike, solely on the basis of the challenged labor dispute disqualification.

It was established at the hearing that the administrative appeal process does not permit the plaintiff to challenge the constitutionality of §4141.29(D)(1)(a). The agency is bound by the prior Ohio court determinations as to the effect of that provision, and the Ohio courts have held the disqualification provision to be constitutional.[1] The plaintiff's failure to exhaust his ad-

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1. In an unpublished decision, the Court of Appeals of Montgomery County, Ohio, upheld the constitutionality of the provision. *Barnes v. Board of Review,* Case No. 3948, (1972). Moreover, the defendants cited to several Ohio Supreme Court cases in their brief and during oral argument in support of their position that §4141.29(D)(1)(a) does not create an unconstitutional classification in violation of the Equal Protection clause of the 14th Amendment. *Cornell v. Bailey,* 163 Ohio St. 50 (1955); *Continental Can Company, Inc. v. Donahue,* 5 Ohio St. 2nd 224 (1966). In *Cornell v. Bailey,* the Supreme Court noted that it was the positive intent of the Ohio General Assembly to exclude those individuals who were involuntarily unemployed as well as those voluntarily unemployed as a result of a labor dispute from benefits. The Supreme Court concluded that such determination was a legislative function and that the only relief available to an involuntarily unemployed claimant was to seek a legislative amendment to the statute.

ministrative remedies therefore does not require a dismissal of his claims.

With regard to the Supreme Court's pronouncement in *Younger v. Harris, supra,* and the Court's subsequent decision in *Huffman v. Pursue,* 420 U.S. 592 (1975), the Court finds that the principles set forth in those cases do not necessitate that this Court exercise restraint in determining the issues raised herein or from issuing injunctive relief, should plaintiff be entitled to the same. While the *Huffman* decision broadens the judicially-created *Younger* doctrine to include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state courts, the Supreme Court in *Huffman* made it clear that its holding was limited to the enjoining of ongoing state-initiated *judicial* proceedings and that such prohibition did not extend to an action brought under 42 U.S.C. §1983 in which a party was challenging state administrative action in federal court. *Supra,* n.21.

Finally, this Court concludes that absention would not be proper in this case. Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law which could be rendered constitutionally inoffensive by a limiting construction in the state courts. *Daniels v. Waters,* ..... F.2d ..... (6th Cir. 1975). It has been held that "[A]bstention should not be applied merely to await an attempt to vindicate a claim of the appellant in state court." *Gay v. Board of Registration Commissioners,* 466 F.2d 879, 885 (6th Cir. 1972). In the instant case, plaintiff has not yet even reached the first level of judicial review and under §4141.28 of the Ohio Revised Code, he is required to undertake three administrative appeals before he will be

entitled to file his challenge in the state courts, where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled.

Accordingly, for the reasons set forth above, the Court concludes that the principles of comity, equity, and federalism do not require that this Court dismiss the instant suit or abstain from deciding the claims presented herein until such time as the state courts may have an opportunity to adjudicate the same or from issuing whatever relief may be appropriate upon its determination.

B. *Class Certification*

Plaintiff, in his complaint, defined the class he purports to represent herein as all persons whose claims for unemployment benefits have been or will be denied because of the operative effect of §4141.29(D)(1)(a). While the Court does find that class certification of the claims for injunctive and declaratory relief and past benefits is appropriate, the class as defined by plaintiff in his complaint is over broad in light of the nature of plaintiff's claims and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The plaintiff's factual allegations and the undisputed evidence presented herein established that Hodory and approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in §4141.29(D)(1)(a), despite the fact that they may have been qualified

in all other respects to receive the benefits.[2] With regard to this particular group of individuals, the Court finds that the prerequisites to certification of this action as a class action under Rule 23(a) have been met, and that the class action is maintainable under the provisions of Rule 23(b)(2)[3]. In light of the fact that the class is certified as a Rule 23(b)(2) class and the nature of the relief sought, the Court concludes that notice prior to the determination of the claims herein is not required.

C. *Constitutional Validity of §4141.29(D)(1)(a)*

Plaintiff has challenged the constitutionality of §4141.29(D)(1)(a) on several grounds. For the reasons set forth below, this Court concludes that the operative effect of that labor dispute disqualification provision violates the rights of plaintiff and the class he represents to equal protection and due process of law as

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2. At the hearing, plaintiff stated that the claims of some 6100 Autoworkers in Youngstown, Ohio have been denied by defendants on the sole basis of the challenged disqualification provision. However, no further factual support was offered in this regard from which this Court can conclude that plaintiff's representation of these individuals in this suit would be proper under Rule 23.

3. The fact that plaintiff seeks the award of past unemployment benefits does not effect the certification of this class as a Rule 23(b)(2) class. The monetary relief is essentially in the nature of equitable relief rather than damages, and there is authority to support the maintainability of the class under 23(b)(2) in such circumstances. *Bermudez v. U.S. Department of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973); *see also, Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); 3B Moore's Federal Practice ¶23.40.

guaranteed under the 14th Amendment to the United States Constitution and 42 U.S.C. §1983.

Chapter 4141 of the Ohio Revised Code, which was enacted by the Ohio Legislature pursuant to the Federal Social Security Act, provides generally for the payment of benefits to unemployed individuals. In §4141.29 it is indicated that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment. That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving such benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through some fault of their own.[4] Thus the provisions of §4141.29(d)(1) reflect that an individual may not receive benefits if that person has been laid off for disciplinary reasons; or if the person quit work without just cause; or if the individual quit work to become married or because of marital, parental, filial or other domestic obligations, or became unemployed because of pregnancy; or if the person has made false statements in an attempt to obtain benefits; or if the person was discharged for dishonesty in connection with his most recent employment; or if the person has become unemployed as the result of a labor dispute. Therefore, the only class of unemployed individuals who are presently ineligible for benefits as a result of their having become unemployed involuntarily are those per-

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4. The statute was previously held constitutional in the case of *Lasko v. Garnes,* No. C 72-1350 (N.D. Ohio, decided August 14, 1973), wherein the disallowance of benefits because of pregnancy, was the basis of the challenge.

sons who fall within the labor dispute disqualification found in §4141.29(D)(1)(a).[5]

A state legislature may create a classification which discriminates against certain individuals without violating the Equal Protection clause in the 14th Amendment, if that classification furthers a suitable governmental interest. *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972).

In the instant action, the defendants argued in their brief that the legitimate reasons for the enactment of §4141.29(D)(1)(a) were that:

> 1. Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect be subsidizing the union members;
>
> 2. Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. If the financial burden of supporting its striking union members is shifted from the unions' treasury to the State of Ohio, it's conceivable that no concerted effort to negotiate a fair settlement would be pursued until the employer reached a financial crisis, thereby yielding to unreasonable and economically unsound union demands to prevent bankruptcy;

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5. Of course, as of December 2, 1975 defendants will not be permitted to deny benefits to one unemployed due to a labor dispute unless an element of fault—"financing, participating in, or directly interested in"—is demonstrated. However, the amendment does not moot the issues raised herein, since, as noted previously, it is not to be applied retroactively and will not effect the status of plaintiff and the class for the period during which they were denied benefits pursuant to §4141.29(D)(1)(a).

> 3. The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U.S. Steel, Republic Steel . . . and other corporate giants involve many hundreds of employees, even thousands. Benefits paid to workers resulting from labor strikes lasting for many weeks or months would deplete the unemployment fund.

The Court concludes that defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. Each reason advanced contemplates that a union member, who is unemployed by virtue of a labor dispute between his employer and another union, has some control over, is at fault, or stands to benefit from that labor dispute. In fact, the evidence presented herein established that plaintiff and the class he represents were merely victims of the coal miners' strike, as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect his employer's financial ability to continue to employ him. The fact that the plaintiff and the 1250 class members also happen to be union members (of a different union) is certainly no legitimate reason, standing alone, to deny them benefits. Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intending to prevent is not the "subsidizing" of unemployed *union members* per se, but the subsidizing of union-initiated work stoppages.

Certainly the three purposes offered by defendants would be legitimate reasons for the State's denial of benefits to unemployed members of a union which is

involved in a labor dispute. However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid the subsidization of the coal miners' strike. Nor is it logical to conclude that payments of unemployment benefits to the *Steelworkers* would have placed U.S. Steel or Republic Steel at an unfair disadvantage in negotiations with the *coal miners' union*. Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy.

The Court finds, therefore, that the defendants have failed to demonstrate that the classification imposed by §4141.29(D)(1)(a) is justified by a legitimate state interest under the circumstances of this case, and, accordingly, the Court concludes that the application of the labor dispute disqualification to deny benefits to plaintiff and the class certified herein is violative of the Equal Protection clause of the 14th Amendment and plaintiffs' rights as guaranteed by 42 U.S.C. §1983.

Similarly, the Court finds that the defendants have failed to demonstrate that the application of §4141.29(D)(1)(a) with respect to plaintiff and the class bears a real and substantial relation to a legitimate state purpose and, therefore, the statutory provision as applied in this case to deny individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer, also violates plaintiffs' right to due process of law guaranteed by the 14th Amendment and 42 U.S.C. §1983.

Since the Court has declared the application of §4141.29(D)(1)(a) to be constitutionally invalid as to plaintiff and the class members on equal protection and due process grounds, the Court need not reach the other issues raised by plaintiff in his complaint.

D. *Relief*

The Court finds that plaintiff and the members of the class of steelworkers, who were laid off for a specific period of time because of the labor dispute between their employer and the United Mine Workers and who, but for the labor dispute disqualification provision, §4141.29(D)(1)(a), would have been entitled to collect unemployment benefits, are entitled to equitable relief in this case. Accordingly, the defendants, their agents and employees are enjoined from continuing to enforce §4141.29(D)(1)(a) of the Ohio Revised Code so as to deny the unemployment benefits to plaintiff and the class members which they are entitled to receive. In this regard, the defendants shall pay those past unemployment benefits which would have been provided to each otherwise qualified claimant within this class to whom such benefits were denied on the sole basis of §4141.29(D)(1)(a).

This case is hereby terminated.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

THOMAS D. LAMBROS
District Judge

ROBERT B. KRUPANSKY
District Judge

DATED: March 4, 1976

Judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff
v.
OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants
No. C 75-15 Y

CELEBREZZE, *Circuit Judge*
LAMBROS, *District Judge*
KRUPANSKY, *District Judge*

Judgment

In accordance with the accompanying Memorandum Opinion and Order, the defendants are enjoined from continuing to enforce Ohio Revised Code §4141.29(D)(1)(a) so as to deny the plaintiff and the class members the unemployment benefits to which they are otherwise entitled, and defendants are further ordered to pay past unemployment benefits which were denied plaintiff and members of the class solely on the basis of §4141.29(D)(1)(a). Plaintiffs shall recover their costs of suit.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

THOMAS D. LAMBROS
District Judge

ROBERT B. KRUPANSKY
District Judge

DATED: March 4, 1976

Appeal.

IN THE
SUPREME COURT OF NORTH CAROLINA
SPRING TERM, 1963

In the Matter of:
J. K. ABERNATHY
SS No. 244-42-7854
Employee, et al
EASTERN AIR LINES, INCORPORATED
EMPLOYER
and
EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA
No. 233—
From
Mecklenburg

Appeal

Appeal by the Employment Security Commission of North Carolina from Riddle, S. J., October, 1962 Special "B" Term, Mecklenburg Superior Court.

This proceeding was instituted before the Employment Security Commission of North Carolina, hereafter called the Commission, by J. K. Abernathy and others, employees of Eastern Air Lines, Inc. (hereafter called Eastern), who filed claims for unemployment insurance benefits during the time they were out of work or furloughed from their jobs as a result of a labor dispute between the flight engineers and Eastern. In due course the Chairman of the Commission ordered the claims referred to R. B. Overton, Special Appeals Deputy, for hearing and disposition. After due notice, the interested parties appeared before Mr. Overton on July 12, 1962. After concluding the hearing on July 18, 1962, the Ap-

peals Commissioner made detailed findings of fact, stated conclusions of law, and ordered that "all those individuals whose names appear on 'Exhibit A' shall be and the same are disqualified from receiving unemployment insurance benefits beginning June 23, 1962, through July 12, 1962, and continuing as long as the labor dispute between Eastern Air Lines, Inc., and the flight engineers remain in active progress and their unemployment is caused thereby."

The parties adversely affected by the finding, conclusion, and order of the Special Appeals Deputy, including the director, Unemployment Insurance Division, petitioned for and were granted a review by the full Commission. Hearing on review by the Commission began on August 10, 1962. At the conclusion of the hearing the Commission (among other things not deemed essential to the dispute) made these findings:

"1. Eastern Air Lines, Inc., hereinafter referred to as the employer, is a corporation engaged in the business of commercial air transportation, transporting passengers, U. S. mail, and cargo in interstate commerce by means of airplanes serving twenty-six states in the eastern half of the United States and one hundred and twenty cities, and in addition thereto, serving Mexico City, Puerto Rico, Bermuda and Canada.

"2. The employer normally employs seventeen thousand nine hundred and six employees throughout its system with between six hundred and fifty and seven hundred being based in North Carolina working at or out of the airports and/or cities served in this State.

"3. The classification of the employees utilized by the employer consists of various skills and vocations, among which are mechanics and related skills, pilots, stewards, stewardesses, flight engineers, communication workers, dispatchers, and various clerical workers, and others, including some non-union personnel.

"4. The employees of Eastern Air Lines, Inc. are represented through its system by the following unions or associations according to their skills and vocations: (1) International Association of Machinists; (2) Airline Pilots Association; (3) Airline Stewards and Stewardesses Association; (4) Flight Engineers International Association; (5) Communication Workers of America Union; and (6) Airline Dispatchers Association. Such unions or associations have been duly certified under the Federal Statutes as the bargaining agents for their members and all other personnel performing similar or related duties, and such bargaining is on a system-wide basis.

"5. In its system the employer employs five hundred and seventy-five flight engineers whose services are utilized on four-engine aircraft throughout its system. Some of such four-engine aircraft land and take off with passengers and cargo at all airports in the system located in North Carolina; namely, Charlotte, Raleigh-Durham and Greensboro-High Point, taking on passengers and cargo at each airport as the necessity arises. Jet planes belonging to the employer also land and take off from the airport in Charlotte taking passengers and cargo to and from that airport as the necessity arises. Flight

engineers are employed and used on all four-engine and jet aircraft landing and taking off in North Carolina. None of the flight engineers are based in North Carolina although they fly in and out of the various airports on schedules of four-motored piston driven planes and all jet planes serving North Carolina. The flight engineers perform services at each of the company's facilities in North Carolina and elsewhere throughout its entire system. When the four-engine piston driven planes and jet planes land at the North Carolina airports, the flight engineers inspect the planes for safety, airworthiness and determine the distribution of gasoline.

"6. Approximately thirty-five per cent of the planes used by the employer in its system are two-engine aircraft and on all the two-engine aircraft the services of flight engineers are not used. Approximately sixty-five per cent of the planes used by the employer in its system consist of four-engine piston planes and jets, all of which utilize the services of flight engineers.

"7. On June 23, 1962, the five hundred and seventy-five flight engineers went on strike and refused to carry out their work assignments. This strike and refusal to work was in protest of the failure of the employer and the bargaining agent representing the flight engineers to reach an agreement as to the qualifications of the flight engineers, there being a difference of opinion between such parties as to whether the flight engineers should also be qualified as pilots. Beginning on June 23, 1962, and continuing through the date of the hearing by the Special Appeals Deputy on July 12, 1962, the flight engineers

failed and refused to perform their services in bringing planes in and out of the facilities of the employer in North Carolina, and elsewhere.

"8. In consequence of the strike of the flight engineers, the employer cancelled all flights and furloughed several thousand employees, including its employees in North Carolina, a list of which is hereto attached and marked 'Exhibit A.' Those individuals whose names on 'Exhibit A' hereto attached were unemployed beginning June 24, 1962, through July 12, 1962, the date of the hearing before the Special Appeals Deputy, and their unemployment is due to the dispute or controversy in existence between the flight engineers and the employer; that the controversy between the flight engineers and the employer was still in existence as of the date of the hearing before the Special Appeals Deputy on July 12, 1962. * * *"

"From the findings of fact . . . it is concluded that a labor dispute was in active progress between Eastern Air Lines, Inc., and the flight engineers on June 23, 1962, at the time of the strike or walkout of the flight engineers, and that such labor dispute was still in active progress as of July 12, 1962." The Commission, by Decision No. 3301, denied the claims upon the ground that G. S. 96-14 (4) disqualified the laid-off employees for insurance benefits. Upon appeal and after hearing, the Superior Court entered the following order:

"AND THE COURT being of the opinion that the Employment Security Commission is in error in finding and concluding that the claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G. S. 96-14 (4) upon

the facts and circumstances revealed by the evidence in the record, and that its decision is therefore in error and should be set aside; AND THE COURT being of the further opinion that if, upon the record before the Commission, the provisions of G. S. 96-14 (4) should be construed as imposing a disqualification upon the appealing claimants who are otherwise eligible for unemployment benefits, then the provisions of G. S. 96-14 (4), as so applied under the facts and circumstances of this case established by the record herein, constitute an unlawful discrimination against these claimants in violation of rights guaranteed to them by the Statutes and Constitution of the United States and by the Constitution of the State of North Carolina.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that Decision No. 3301 rendered by the Employment Security Commission of North Carolina on August 31, 1962, be an the same is hereby reversed and set aside."

The Employment Security Commission of North Carolina appealed.

W. D. Holoman, R. B. Billings, D. G. Ball, for the Employment Security Commission of North Carolina, appellant

Gambrell, Harlan, Russell, Moye & Richardson,

By: E. Smythe Gambrell, William G. Bell, Jr., Harold N. Hill, Jr., Sidney F. Wheeler, for Eastern Air Lines, Inc., appellee

Blakeney, Alexander & Machen,

By: Bailey Patrick, Jr., for North Carolina Employees of Eastern Air Lines, Inc., except the 123 Captains and Air Line Pilots based in North Carolina, appellees

Warren C. Stack,

By: James L. Cole, for Charlotte Council, Air Line Pilots Association, Eastern Air Lines, Inc., appellees

Joyner & Howison,

By: William T. Joyner, for Harriet Cotton Mills and Henderson Cotton Mills, *amicus curiae*

HIGGINS, J.

Here for review is the Superior Court judgment that the Employment Security Commission committed error (1) "In finding and concluding that claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G. S. 96-14 (4) upon the facts and circumstances revealed by the evidence in the record, . . ." and (2) If the 1961 amendment should be construed as a disqualification, then it constitutes an unlawful discrimination in violation of the State and Federal Constitution. From this judgment the Commission appealed. The right to appeal is given by G. S. 96-15.

In their appeal to the Superior Court from the Commission, the claimants, by exceptions, challenged the sufficiency of the evidence to support the Commission's findings of fact. The trial court did not pass on these exceptions. It seems from the wording of the judgment the court did not attempt to set aside any of the findings. However, to eliminate any uncertainty in this respect, we have reviewed all the evidence and conclude that it furnishes support for the Commission's findings of fact.

Findings, supported by competent evidence, are conclusive on appeal. Employment Security Commission v. Freight Lines, 248 N. C. 496, 103 SE 2d 829; In Re Stutts, 245 N. C. 405, 95 SE 2d 919; Employment Security Commission v. Simpson, 238 N. C. 296, 77 SE 2d 718; G. S. 96-15(i). The pivotal question, therefore, is whether the claimants are disqualified by the 1961 amendment to G. S. 96-14.

In the judicial process of construing legislation the courts take a long look at the purposes to be accomplished. The Congress, using the English Act of 1911 as a pattern, passed the Federal Social Security Act on August 14, 1935. One of its major purposes was to give aid, to be administered through State agencies, to those out of work through no fault of their own. To be eligible for Federal contributions, a State agency was required to levy an unemployment compensation tax on employers to supplement the Federal contribution. In its extra session in 1936 the North Carolina General Assembly enacted its Unemployment Compensation Law to take advantage of the Federal grant. One of its major purposes was to provide a fund by systematic accumulations during periods of employment to be retained and used for the benefit of persons furloughed from their jobs through no fault of their own.

Both the State and Federal Acts were passed at a time when the country appeared to be in the initial stages of recovery from a disastrous depression. The lessons learned in the early thirties were both fresh and poignant. The intent was to accumulate, by Federal grant and by an employer's tax, an insurance fund which in a time of need would tide over workers temporarily laid off because work was not available. Employers in all probability did not contemplate their tax money

would be used to encourage any work stoppage resulting from a labor dispute. In discussing this background, the Nebraska Law Review, Vol. 37, No. 4, of June, 1958, contained the following:

> "(1) It was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes, because it was feared that if benefits were available to all workers unemployed as a result of a trade dispute, they would be encouraged to suspend work in furtherance of their position in the dispute, thereby imposing an unfair burden upon the employer, and working injury upon the national economy and upon the public at large; (2) because there had been no previous experience, it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating the primary purpose for which the fund was created—the payment of benefits when unemployment was due to 'fluctuations in trade.' "

It is doubtful whether in 1935-36 legislators—Federal or State—had in contemplation a time when a few specialists out on strike could force a shutdown of a flourishing business employing nearly 18,000 persons in 26 States, the District of Columbia, Canada, Mexico and Puerto Rico. Neither was it contemplated that the insurance fund could be depleted by workers who were not actually participating in the strike but who were out of work because of it. The depletion of the insurance fund required further employer taxes.

As the years passed the original objects lost some of their clear outlines. Rules and regulations were relaxed permitting depletion of the fund for purposes not

in contemplation when provision was made for it. However, in North Carolina the amendment of 1961 reversed the trend. Prior to July 1, 1961, G. S. 96-14 provided:

> "An individual shall be disqualified for benefits . . . (4) For any week with respect to which the Commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Commission that— (a) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and (b) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: Provided, for the purpose of this subdivision (4), that if in any case separate branches of work which are commonly conducted as separate business in separate premises are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment, or other premises."

Effective July 1, 1961, the General Assembly, by Chapter 454, Session Laws of 1961, struck out all of Section 4 above quoted and substituted the following:

> "(4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit."

The effect of the amendment was to eliminate from Section 4 the means therein provided by which an employee might escape disqualification. Likewise, the amendment removed the provision that separate branches of work commonly conducted in separate premises or in separate departments of the same premises shall be deemed to be separate factories, establishments, or other premises. Instead the amendment extended the disqualification if the unemployment is caused by labor dispute in progress at the factory at which the worker was employed or at another place, either within or without this State, if owned or operated by the same employing unit and which supplies materials or services necessary to continue the operation where he was employed.

In this case planes carrying practically two-thirds of Eastern Air Lines' transportation business were grounded because flight engineers refused to operate or to service the planes. Only two-motor craft could operate without the flight engineers. These small planes were engaged in feeder operations on short flights. The heart of Eastern's business was the four-motor and jet planes. As a result of the labor dispute between Eastern and its flight engineers, Eastern was forced to shut down its operations and to close its terminals in North Carolina where claimants had been at work. So far as the results are concerned, it was immaterial where the flight engineers lived, or where their flights originated. When they left the planes, transportation stopped. Eastern's employees at the terminals in North Carolina were furloughed because Eastern was forced out of business by the strike.

Without force is the argument that flight engineers were not based in North Carolina and hence the terminals in this State constituted other plants, factories, establishments, and premises of the employing unit. It must be remembered that new Section 4, in effect at the time the work stopped, extends the disqualification to workers at a factory, establishment, or other premise which supplies necessary materials or services to the plant where the claimants were last employed. The striking flight engineers refused to help man the planes to or from the terminals in North Carolina. This failure to perform this service caused the shutdown at the terminals where claimants were employed.

The many cases cited by the Air Line Pilots Association are not in point. Their brief states: "Since no statute has been found in any jurisdiction written in

the discriminatory language of G. S. 96-14 (4), as amended, all cases reviewed reveal situations arising under Unemployment Security Acts which are similar to the North Carolina Unemployment Security Act prior to 1961." The Commission was bound by the disqualifying terms of the 1961 amendment. Its duty was to protect the integrity of the insurance fund and to be neutral between the management and the workers.

The disqualification resulted from the labor dispute between the flight engineers and Eastern. All flight engineers in the system were out on strike. Their duties were so integrated into Eastern's entire operation that the big planes were grounded because of their refusal to work. Cameron v. DeBoard, 230 Or. 411, 370 P. 2d 709; Depaoli v. Ernst, 73 Nev. 79, 309 P. 2d 363; Adamski v. State, Bureau of Unemployment Comp., 108 Ohio App. 198, 161 NE 2d 907; Spielmann v. Industrial Commission, 236 Wis. 240, 295 NW 1; Ford Motor Co. v. Abercrombie 207 Ga. 464, 62 SE 209; Park v. Appeal Board of Michigan Employ. Sec. Com'n., 355 Mich. 103, 94 NW 2d 407; Magner v. Kinney, 141 Neb. 122, 2 NW 2d 689.

The cases here discussed, and many more therein cited, would seem sufficient to convince all but the highly skeptical that in passing the 1961 amendment the North Carolina General Assembly acted within its constitutional powers. "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581, 76 L. ed. 1167; In re Stevenson, 237

N. C. 528, 75 SE 2d 520; Employment Security Com. v. Jarrell, 231 N. C. 381, 57 SE 2d 403; In re Steelman, 219 N. C. 306, 13 SE 2d 544. "Legislative bodies may distinguish, select, and classify objects of legislation. . . . They may prescribe different regulations for different classes. . . . The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination." State v. Trantham , 230 N. C. 641, 55 SE 2d 198; see also, Bickett v. Tax Commission, 177 N. C. 433, 99 SE 415; Magion v. Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037; City of Springfield v. Smith, 322 Mo. 1129, 19 SW 2d 1; Unemployment Compensation Com. v. Willis, 219 N. C. 709, 15 SE 2d 4; Steward Machine Co. v. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. ed. 1279. The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualification contained in the 1961 amendment involves a question of degree and not of principle.

For the reasons here stated, we hold the judgment of the Superior Court of Mecklenburg County was erroneous and must be

Reversed.

Rodman, J., took no part in the consideration and decision of this case.

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE
SUPERIOR COURT
26TH JUDICIAL DISTRICT

In the Matter of:
J. K. ABERNATHY
SS No. 244-42-7854
Employee, et al.
and
EASTERN AIR LINES, INCORPORATED
Employer
and
EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Judgment

This cause, coming on to be heard and being heard before the undersigned Judge Presiding over the October 22, 1962, Special B Civil Term of Mecklenburg County Superior Court upon appeals from a decision of the Employment Security Commission of North Carolina rendered on August 31, 1962, entitled "In The Matter Of: J. K. Abernathy, SS No. 224-42-7854, Employee, et al, and Eastern Air Lines, Incorporated, Employer," Denision No. 3301, pursuant to Notice of Appeal filed on September 4, 1962, in behalf of the employee-claimants who are members of the Charlotte Council of the Air Line Pilots Association and Notice of Appeal filed on September 7, 1962, in behalf of all other employee-claimants covered by Decision No. 3301, Formal State-

ment of Grounds of Appeal having been filed on September 6, 1962, in behalf of the claimants who are members of the Charlotte Council of the Air Line Pilots Association, and Statement of Grounds for Review and Exceptions to the Commission's Decision having been filed on September 15, 1962, in behalf of all other employee-claimants covered by Decision No. 3301, all in accordance with the provisions of North Carolina General Statutes Section 96-15, Subparagraph (i);

AND THE COURT having heard argument of counsel for each of the above described categories of claimants and argument of General Counsel for the Employment Security Commission, and having considered the entire record as returned to this Court pursuant to the requirements of the above mentioned Section of the General Statutes, and being otherwise fully advised as to all manners pertinent to said appeal;

AND THE COURT being of the opinion that the Employment Security Commission is in error in finding and concluding that the claimants are disqualified from receiving Employment Security benefits by reason of the provisions of G. S. 96-14(4) upon the facts and circumstances revealed by the evidence in the record, and that its decision is therefore in error and should be set aside; AND THE COURT being of the further opinion that if, upon the record before the Commission, the provisions of G. S. 96-14(4) should be construed as imposing a disqualification upon the appealing claimants who are otherwise eligible for unemployment benefits, then the provisions of G. S. 96-14(4), as so applied under the facts and circumstances of this case established by the record herein, constitute an unlawful discrimination against these claimants in violation of rights guaranteed

to them by the Statutes and Constitution of the United States and by the Constitution of the State of North Carolina.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that Decision No. 3301 rendered by the Employment Security Commission of North Carolina on August 31, 1962, be and the same is hereby reversed and set aside.

THIS THE 25TH DAY OF OCTOBER, 1962.

/s/ H. L. RIDDLE, JR.

Judge Presiding

MOTION FILED
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IN THE
Supreme Court of the United States
October Term, 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND BRIEF *AMICUS CURIAE*

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1976

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The Chamber of Commerce of the United States of America respectfully moves for leave to file the attached brief *amicus curiae* on behalf of Appellants in the present case, pursuant to Rule 42 of the Rules of this Court. Counsel for Appellant has given consent for this filing.

1. The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of

commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. In order to represent its members' view on questions of importance to their vital interest and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* (and as a party) in a wide range of significant labor relations matters before this Court; *e.g.*, *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, 416 U.S. 115 (1974); *The Chamber of Commerce of the United States of America, Petitioner* v. *Robert Francis, et al., Respondent*, Petition for Writ of Certiorari pending; *Geduldig* v. *Aiello, et al.*, 417 U.S. 484 (1974); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

3. The underlying question presented in this case is whether a state may provide financial support to one of the parties to a labor dispute—the union—by granting public benefits to non-striking workers temporarily idled as a direct result of such a dispute. This case, then, is another in the growing list of decisions involving the issue of whether public funds may be provided to workers participating in or affected by a labor controversy.

The Chamber's concern about the manner in which this question will be resolved is evinced by its repeated participation in litigation presenting this issue. Thus, the Chamber has participated as *amicus curiae* before this Court in *Super Tire*,

supra, and as a party before various lower courts.[1] Indeed, the Chamber has been the only party who has consistently litigated the questions presented by this cause and is therefore uniquely able to contribute to their resolution.[2]

Respectfully submitted,

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[1] The Chamber was permitted to intervene and participate in the evidentiary hearing in *Hawaiian Telephone Company*, 378 F. Supp. 794 (D. Hawaii). The Chamber was permitted to intervene in *Grinnell Corp.* v. *Hackett*, 475 F.2d 499 (CA 1, 1973) *cert. den.* 414 U.S. 858 (1973); *Russo* v. *Kirby*, 453 F.2d 584 (CA 2, 1971); *U.S. Chamber of Commerce* v. *Francis* (CA 4 No. 74-1991); and, over opposition the Chamber has been permitted to participate as a party-plaintiff in pending proceedings in *Dow Chemical Co. and the Chamber of Commerce of the United States of America* v. *Taylor*, 57 F.R.D. 105 (E.D. Mich. Civil No. 38664).

[2] The Third Circuit in *Super Tire* observed that the Chamber, while not designated as a formal party, was the *real* party in interest whose presence indicated an ongoing interest in the issues raised in that litigation. *Super Tire* raised issues that are closely related to the issues presented in the instant case.

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IN THE
Supreme Court of the United States
October Term, 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND BRIEF *AMICUS CURIAE*

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

SUMMARY OF THE ARGUMENT*

The State of Ohio has disqualified persons idled due to a labor dispute involving their employer. Those disqualified include not only striking employees, but also those non-striking

* The interest of the *amicus curiae* is set forth in the Motion filed with this brief.

employees laid off due to the dispute, when the dispute takes place at a location functionally integrated with the laid off employees' place of work.

The court below distinguished between these two groups of employees holding the Ohio law unconstitutional only as it applied to the latter.

It is here contended that the decision below is unsound, and that the denial of unemployment benefits to any employee idled because of a labor dispute involving his employer is consistent both with federal labor policy and with the purpose of the Social Security Act. The cornerstone of federal labor policy is the resolution of economic disputes by free collective bargaining. This policy mandates that the resolution of labor controversies depend upon the strength and tenacity of the bargaining parties, themselves. Thus, under the federal scheme of labor relations, each bargaining party recognizes that he will be required to endure the immediate and future consequences of a continued disagreement, a strike or a lockout, and that this cost to him may exceed the expense of compromise and agreement. Any economic hardship which employees may suffer as a result of maintaining their collective bargaining demands is an accepted and proper aspect of the confrontation of economic power. As long as the parties recognize that they alone must bear the risks attendant to intransigence or the utilization of economic force, the collective bargaining process will continue to produce the voluntary compromises that Congress intended.

It follows that federal labor policy interdicts state intrusion into the bargaining process when this intrusion unsettles the federally created balance of power and rights, and instead mandates strict state neutrality during a labor dispute. Thus, it is that federal labor policy proscribes public financial support—through state aid—during a labor dispute for one or the

other of the bargaining parties, since this support, by relieving an intractable party of the cost of a prolonged disagreement, will in effect forestall voluntary compromise.

Payment of unemployment benefits, whether to striking employees or to non-strikers idled because of a labor dispute involving their employer, violates the congressional mandate that states remain neutral in labor disputes. Where these benefits are paid by the state, the employer whose employees are idled due to this dispute must, as a general rule, restore the funds to the state. His financial burden may well be substantial whether strikers, non-striking employees idled due to the strike or both are granted benefits. It is this cost burden that occasions the employer to accept contract proposals disadvantageous to him in order to forestall or curtail a strike. The settlement reached, therefore, is not reflective of the strength of the employer, if these benefits were not available to his employees. Free collective bargaining as envisioned by federal labor policy has thus been undermined by the availability of these benefits.

Moreover, the denial of unemployment benefits to those idled due to a labor dispute involving their employer is consistent with and permitted by the federal social security law. While each state has been accorded considerable freedom to develop its own particular unemployment benefit program so that the plan that results will be best adapted to local conditions, the latitude permitted the states is not without limitation. Thus, states may not depart from those standards which Congress has deemed to be fundamental.

The Social Security Act was designed to provide essential income maintenance to persons who lost their employment due to a business depression or to fluctuations in trade. It is axiomatic that persons idled as a result of a labor dispute involving their employer are not unemployed due to these reasons. It follows that their ineligibility for unemployment benefits is consistent with and permitted by the federal social

security scheme. Indeed, it is submitted that their eligibility expands the remedial purposes of the Act beyond the perimeters intended by Congress. The fact that the Social Security Act does not expressly preclude benefit payments to persons idled due to a labor dispute does not compel a contrary conclusion. Since Congress has prescribed free collective bargaining, unfettered by state intrusion, to be the mechanism to resolve labor disputes, provision by a state of these benefits is impossible; their availability places employers at a bargaining disadvantage. Moreover, the terms of the Social Security Act, itself—forbidding *inter alia* the denial of benefits to persons who refuse employment as strike breakers—guard against the use of that Act to undercut labor at the bargaining table. It is reasonable to conclude that Congress also intended that the Act would not frustrate management's bargaining strength and rights.

ARGUMENT

A. THE DENIAL OF UNEMPLOYMENT BENEFITS TO EMPLOYEES IDLED DUE TO A LABOR DISPUTE INVOLVING THEIR EMPLOYER IS CONSISTENT WITH FEDERAL LABOR POLICY.

1. Congress Has Regulated Labor Relations and Has Determined to Allow the Balance of Bargaining Advantage to Be Set by Economic Power Realities, Unaided by State Subsidies.

Congress has regulated labor relations to the fullest extent of its constitutional powers under the Commerce Clause *NLRB* v. *Fainblatt*, 306 U.S. 601, 607-8 (1939). Section 1 of the National Labor Relations Act (29 U.S.C. § 141, *et seq.*) declares it "to be the policy of the United States to eliminate . . . substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . " This legislative purpose is to be accomplished by

protecting the right to bargain collectively rather than by compel[ing] agreements between employers and employees. [The Act] does not compel any agreement whatever." *NLRB* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 45 (1937).[1]

Consistent with the federal legislative purpose of fostering the collective bargaining process without compelling agreements between an employer and his employees, Congress structured a bargaining system leaving the negotiating parties to their respective resources if a confrontation of economic power developed. Thus, Congress in Section 13 of the National Labor Relations Act created the federal right to employees to strike, and thereby left it to the bargaining parties to use this and other legitimate economic weapons "to induce one party to come to the terms desired by the other." *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 489 (1960).

This Court has repeatedly observed that "The Congressional policy manifest in the Act . . . is to allow the balance of bargaining advantage to be set by economic power realities." (*NLRB* v. *Burns*, 406 U.S. 272, 288 (1971)) and has stated that in addition to strikes, lockouts are a legitimate instrument of coercive power when they are utilized by an employer to pressure a union to modify its bargaining demands or to secure a favorable settlement. *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965).[2]

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[1] *(Continued)*

All we do is to remove the barriers that have kept employees away from their employers, which have prevented collective bargaining, which have resulted in strikes without any attempt to negotiate. All we have done is to promote the orderly process of collective bargaining." II Leg. Hist. of NLRA (G.P.O. 1935) p. 2394.

In 1947, Congress expressly included this legislative policy in the Act by amending Section 8(d) of the Act to read:

"[The duty to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession."

[2] This Court has also observed that the federal scheme of labor relations requires that a collective bargaining relationship involve a "brute contest of economic power." *NLRB* v. *Insurance Agents Union*, *supra*, at 489.

Congress and this Court have recognized that in certain circumstances labor organizations possess the necessary leverage to achieve their collective bargaining goals; in other situations the realities of economic power are to the contrary. It was not the concern of Congress to equalize or affirmatively structure or alter the relative bargaining power of labor and management on a national scale. " . . . the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse." *Porter* v. *NLRB*, 397 U.S. 99, 109 (1970).

The foregoing demonstrates that the cornerstone of federal labor policy is the resolution of economic disputes by free collective bargaining. This policy mandates that the resolution of labor controversies depend upon the strength and tenacity of the bargaining parties, themselves.[3] Thus, under the federal scheme of labor relations, each bargaining party recognizes that he will be required to endure the immediate and future consequences of a continued disagreement, a strike or a lockout, and that this cost to him may exceed the expense of compromise and agreement. The "right to bargain collectively does not entail any right to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 309 (1965). Any economic hardship which employees may suffer as a result of maintaining their collective bargaining demands is an accepted and proper aspect of the confrontation of economic power. As long as the parties recognize that they alone must bear the risks attendant to

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[3] Cox, *Labor Law Pre-emption Revisited*, 85 Harv. L. Rev. 1337, 1351-1359 (1972).

intransigence or the utilization of economic force, the collective bargaining process will continue to produce the voluntary compromises that Congress intended.[4]

It follows that federal labor policy interdicts state intrusion into the bargaining process when this intrusion unsettles the federally created balance of power and rights, and instead mandates strict state neutrality during a labor dispute. Thus, it is that federal labor policy proscribes public financial support—through state aid—during a labor dispute for one or the other of the bargaining parties, since this support, by relieving an intractable party of the cost of a prolonged disagreement, will in effect forestall voluntary compromise.[5]

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[4] The legislative history is replete with references to such congressional intent. Senator Taft stated:

> "Our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels he can make an unreasonable demand and get away with it.... If there is reasonable equality at the bargaining table, I believe there is much more hope for labor peace." I NLRB Legislative History of the Labor Management Relations Act at 1007 (1947).

As Mr. Justice Frankfurter stated:

> "[The NLRA] leaves the adjustment of industrial relations to the free play of economic forces (and) seeks to assure that the play of those forces be truly free." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 183 (1941).

[5] The comprehensive study of Thieblot and Cowin, *Welfare and Strikers: The Use of Public Funds to Support Strikers*, Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania Press (1972), similarly observed:

> "The overwhelming weight of opinions unearthed by our studies, including those of strikers, union officials, and management personnel, was that the payment of tax supported benefits to strikers, by greatly reducing the economic pressure on those strikers, substantially diminished the back pressures from union members to settle and thereby made strikes last longer. Moreover, it seemed clear in the case studies that strike settlements were made more costly as managements, realizing what was occurring, paid more dearly to end the dispute," at 218.

2. By Denying Unemployment Benefits to Employees Idled Due to a Labor Dispute Involving Their Employer, the State Has Manifested a Policy That is Consonant with Federal Labor Policy.

The State of Ohio has disqualified persons idled due to a labor dispute. Those disqualified include not only striking employees, but also those non-striking employees idled due to the dispute, when that dispute takes place at a location functionally integrated with the idled employees' place of work.

The court below distinguished between these two groups of employees holding the Ohio law unconstitutional only as it applied to the latter. Thus, the court below held that the application of this disqualification to deny benefits to individuals who were unemployed through no fault of their own and who did not participate in or *benefit from a labor dispute* involving another union and their employer violated the Constitution.

In reaching its conclusion, the court below observed that the labor dispute disqualification, if applied to employees who strike to support bargaining demands, would be Constitutional, since the grant of public benefits to those strikers would place their employer at an unfair disadvantage in negotiations with their union. The decision below apparently recognized that the payment of public benefits to strikers reduces economic pressure on them and accordingly diminishes their incentive to reach a fair settlement. Moreover, employers, aware of the availability of public benefits for strikers, are more likely to accept union demands that are unreasonable and economically unsound, because these employers realize that the union and its members—assisted by public funds—have little to lose by a long strike.

As will be discussed, the opinion below is analytically unsound since both strikers and non-strikers idled because of a labor dispute should be denied unemployment benefits if the

required state neutrality in labor disputes is to be maintained. However, as will also be discussed, there may be equitable reasons to support the distinction drawn below between strikers and those who do not stand to benefit from the labor dispute but are nonetheless idled because of it. The discussion of such equities should not, however, be taken as endorsing a distinction for purposes of receiving unemployment benefits between those persons who voluntarily strike and those who are involuntarily furloughed *due to a labor dispute*, such as locked out employees.

a. Striking Employees:

Were a state to provide unemployment benefits to striking employees, it would impermissibly intrude upon the federal policy of free collective bargaining, since this provision of benefits would frustrate the ability of employers to negotiate with reasonable equality at the bargaining table. Thus, for example, were Ohio to subsidize striking employees, those subsidies would reduce economic pressures on strikers and diminish the incentive of even weaker unions to seek reasonable compromises. Unions and their members, whose insufficient strength or resolve would encourage them to reach prompt settlements absent the availability of unemployment benefits for strikers, will instead be willing to maintain rigid bargaining stances, comfortable in the assurance that in the event of a strike, the strikers will be compensated by the state subsidies. Then, too, employers who, but for state aid to strikers, could secure favorable compromises, due to their resolve when compared to that of a union or its members, will likely quickly settle for contracts less advantageous to management, well aware that the availability of unemployment compensation to strikers will foster prolonged strikes with the employer bearing the brunt of the cost.[6] The settlements eventually obtained will not be

[6] These costs include not only losses due to retarded production during the strike, but also, in states such as Ohio, to increased state taxes to reflect unemployment benefits paid to his striking employees. *(Continued)*

reflective of the strength or tenacity of the employer or the union, themselves, as free collective bargaining envisions, since the union's power was artificially augmented by state funds.

b. Non-striking employees who are idled because of a labor dispute involving their employer:

Where unemployment benefits are granted to employees who, while not striking, nonetheless are idled due to a labor dispute involving their employer, the *bargaining disadvantage* to that employer is *identical* to that which occurs when these benefits are accorded to strikers. An employer's tax burden—since he must restore funds paid by the State—may well be substantial whether strikers, non-striking employees who are idled due to the strike or both are granted unemployment benefits. It is this cost burden that occasions an employer to accept disadvantageous bargaining settlements that do not represent the strength of the negotiating parties, themselves. For example, in *Abernathy* v. *Eastern Air Lines*, 259 N.C. 190,

[6] *(Continued)*
As stated in the Jurisdictional Statement of the Ohio Bureau of Employment Services at p. 18, Ohio's system of Unemployment Compensation, unlike other forms of social legislation,

> "is not funded from the General Revenue nor does it depend upon employee contributions; rather, it is funded *in toto* by the *employer*. The amount that each employer must annually contribute is calculated based upon his experience rating. The experience rating refers to the relationship existing between the positive or negative balance in an employer's account with the state, compared to the number and amount of the charges against it when viewed over a period of time as set by state statute.
>
> "When there are charges against an employer's account because of the payment of unemployment benefits to his employees, the balance in the employer's account necessarily decreases. When this balance drops below a certain sum, the employer's tax rate for the next ensuring year is increased to offset the deficit."

In short, funds paid to striking employees and charged to their employer's account must be replaced by the struck employer.

130 S.E.2d 292 (1963) *cert. denied* 375 U.S. 161 (1963) a relatively small number of the airlines flight engineers struck because of a labor dispute. As a result of this dispute, thousands of Eastern's employees were idled. If these thousands were to be accorded unemployment compensation and charged against Eastern, the tax increase hanging over that employer would likely be of such magnitude that Eastern would promptly reach a settlement with the union to curtail the strike; a settlement that undoubtedly would not reflect the tenacity of the employer or the union were benefits not paid. The compromise reached would not, therefore, be the product of free collective bargaining and federal labor policy would be undermined.

The foregoing demonstrates that payment of unemployment benefits, whether to striking employees or to non-strikers idled because of a labor dispute involving their employer, violates the congressional mandate that states remain neutral in labor disputes. It is therefore apparent that to foster this congressional design and to wholly refrain from intruding upon federal labor policy, the State of Ohio has enacted the labor dispute provision at issue here. By maintaining this provision Ohio has manifested the strict neutrality in labor disputes as enjoined by Congress.

However, there may exist equitable grounds that support distinguishing, for the purposes of receiving unemployment benefits, between striking employees on the one hand and on the other hand, non-strikers who do not stand to benefit from the strike but who are idled as a result of it. When striking employees are granted unemployment benefits, there is exerted an impermissible double-barrelled impact upon the process of free collective bargaining. (1) Striking employees, encouraged by the payments, maintain rigid bargaining stances, engage in protracted strikes due to the cushioning effect of unemployment benefits, will likely obtain economically advantageous contract settlements—settlements that do not represent their own

bargaining power and that could not be achieved without the backing of state unemployment funds. (2) The known availability of these funds—likely supported solely by employer contributions—will pressure employers to accept economically disadvantageous settlements in order to forestall the huge costs of strikes—costs that include replacing the benefits paid by the State to striking employees. Again, the contract reached will not likely reflect the bargaining strength of the employer, were state aid not granted to strikers.

When non-striking employees who are idled because of a strike but who are not involved in it are granted unemployment benefits, only the second of the two effects just discussed occurs. That is, the idled non-strikers may not stand to gain from the labor dispute and are not direct participants in it. It may be that in this limited situation equities exist to treat these non-strikers differently than strikers and to permit states to grant these non-strikers unemployment benefits.[7]

This is not to suggest that there is a valid basis to distinguish, as did the decision below, between persons who strike and those who are involuntarily idled as a result of a labor dispute. The basis, if any in fact exists, for a distinction between strikers and others idled due to a labor dispute, is whether these others are participants in the labor dispute or stand to gain from it. Thus, employees locked out during bargaining because, for example, of bargaining positions they advanced or because they threaten to strike are, like strikers, direct participants in the labor dispute and stand to gain from it. These individuals—like striking employees—should not be granted unemployment benefits if the states' neutrality posture in labor disputes is to be maintained. To permit locked out

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[7] In some situations where historically an employer's employees are accorded substantially similar working conditions, though represented by different unions or employed in different facilities, these laid-off employees may well gain from a strike by others. In these circumstances benefits should be denied.

employees to receive unemployment benefits would be tantamount to foreclosing the use of this legitimate bargaining weapon. Employers will have little incentive to lockout if they must replace funds paid by the state to their locked out employees. The contract settlement reached without the lockout will likely be less advantageous to the employer than that which he could have achieved following a lockout. Just as in a situation where strikers receive unemployment benefits, the settlement will not reflect the strength and resolve of the employer or the union, due to the intrusion of the state —through state aid—into the bargaining process.

B. THE DENIAL OF UNEMPLOYMENT BENEFITS TO EMPLOYEES IDLED DUE TO A LABOR DISPUTE INVOLVING THEIR EMPLOYER IS CONSISTENT WITH AND PERMITTED BY FEDERAL SOCIAL SECURITY LAW.

Pursuant to the federal-state system for unemployment insurance benefits, each state has been accorded considerable freedom to develop its own particular program so that the plan that results will be best adapted to local conditions.[8] However, the latitude permitted the states is not without limitations. Thus, this Court has observed that "what [the states] may not do. . . . is to depart from those standards which in the judgment of Congress are to be ranked as fundamental." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 594 (1937). It is necessary, then, to examine the purposes underpinning the Social Security Act to determine if the State's disqualifications in this case are to be permitted.

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[8] H.R. Doc. No. 81, 74th Cong., 1st Sess. VI (1935). 115 Cong. Rec. 34106 (1969). Preface to the "Comparison of State Unemployment Insurance Laws," U.S. Department of Labor (1972) at page iii:

> "In the Federal-State system of unemployment insurance established in this country under the Social Security Act, the individual states have been free to develop the particular program that seems best adapted to conditiors prevailing within the state. Consequently, no two State laws are alike."

As this Court has recognized, the Social Security Act was designed to provide essential income maintenance to the unprecedented number of persons who lost their employment due to the Great Depression: "The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve." *Steward Machine Co.* v. *Davis, Supra,* at 586.

It is axiomatic that persons idled as a result of a labor dispute involving their employer are not unemployed due to a business depression or to fluctuations in trade.[9] It follows that their ineligibility for unemployment benefits is consistent with and permitted by the federal social security scheme. Indeed, it is submitted that their eligibility expands the remedial purposes of the Act beyond the perimeters intended by Congress.

While Congress did not expressly preclude benefit eligibility for persons idled due to a labor dispute, this omission cannot be construed as Congressional approval for payment to these persons. In the *first place,* the question is not whether Congress indicated an express determination to preclude the use of unemployment compensation for thee employees. Instead, the issue is whether Congress considered and created a

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[9] It is significant that Congress considered strikers to be employees under the Labor Act by expressly preserving in Section 2(3) the employer-employee status during the cessation of work caused by a labor dispute. As this Court has stated:

> "The status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment' (29 U.S.C. § 152(3))."

NLRB v. *Fleetwood Trailer Co.,* 389 U.S. 375, 381 (1967). Accord: *NLRB* v. *Mackay Radio and Tel. Co.,* 304 U.S. 333, 345 (1938), rev'g 87 F.2d 611, 92 F.2d 761 (9th Cir. 1973). *NLRB* v. *Carlisle Lumber Co.,* 94 F.2d 138, 144 (9th Cir. 1973). Thus, persons who ceased work in support of a strike were not considered by Congress to have terminated their contract of employment, and accordingly are not "unemployed."

framework, through collective bargaining, by which employers and unions were to resolve their economic disputes and in which free collective bargaining was intended to assure that the results of the contest are left to the bargaining strategies and strengths of the parties. Since Congress has, in fact, done so, as is manifest from the authorities cited *supra*, a state is barred from *any* action which disturbs the federally created balance of power and rights. Otherwise, the general framework would forever be in jeopardy from state attack because Congress did not explicitly bar every action a state might take which could affect that framework. This view is endorsed by this Court's observations in *Local 20, Teamsters* v. *Morton*, 377 U.S. 252 at 258-260 (1964). *Morton* concerned activity that was neither expresssly protected nor specifically forbidden by the National Labor Relations Act. This Court stated:

> "it is still necessary to determine whether . . . 'Congress occupied this field and closed it to state regulation.' The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation . . .' For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' " (citations omitted).

As shown above, the payment of unemployment benefits to employees idled in a labor dispute is impermissible since it disturbs the balance of strength created by federal labor policy.

Moreover, in the related area of state welfare payments to strikers, this Court has recognized that the known availability of state subsidies intrudes upon the collective bargaining process.

> "*It cannot be doubted* that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract." *Supertire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 124 (1974) (emphasis added)[10]

This Court, has again reviewed the underlying questions involved here. Last term the Court reminded Wisconsin that it may not aid or strengthen the employer's hand in dealing with his employees during a collective bargaining dispute. In *Lodge 76, Int'l Ass'n. of Machinists* v. *Wisconsin Employment Relations Commission*, U.S. 96 S.Ct. 2548 (1976), an employer sought state aid to end a concerted refusal by his employees to work overtime during collective bargaining negotiations. Mr. Justice Brennan, speaking for the Court, stated (96 S.Ct. at 2557):

> "The employer in this case invoked the Wisconsin law because [it was] unable to overcome the union tactic with its own economic self-help means (footnote omitted) . . . But the economic weakness of the affected party cannot justify state aid contrary to federal law for "as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the

[10] State subsidies for workers improperly impairs the bargaining relationship even after a contract is executed. "Collective bargaining is a continuous process." *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957). State support for employees encourages strikes and intensifies an employer's economic disadvantage if any labor dispute occurs during the day-to-day adjustments of the contract. Such a strike incentive further contravenes the national labor policy favoring arbitration as the preferred method of resolving labor disputes. *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 247-48 (1970); cf. *Buffalo Forge Co.* v. *Steelworkers*, U.S. , 92 LRRM 3032 (No. 75-339 July 6, 1976).

> [National Labor Relations] Act; it is part and parcel of the process of collective bargaining" (citing *Ins. Agents' Union* v. *NLRB*, 361 U.S. 477, 495 (1960)).

Just as Wisconsin may not, consistent with federal labor policy, directly aid an employer by curtailing peaceful concerted employee pressure designed "to induce (the employer) to come to terms desired by [the union], "*Ins. Agents' Union* v. *NLRB, supra*, 361 U.S. at 489, states cannot directly support employees idled due to a labor disputes by grants which mitigate the economic hardships which forge collective agreements.[11]

Earlier in *Nash* v. *Florida Ind. Co.*, 389 U.S. 235 (1967), this Court prevented the state from *denying* unemployment benefits to an individual who filed unfair labor practice charges with the Labor Board because this denial "frustrated the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." at 239.

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[11] This Court's summary dismissal of the appeal in *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* U.S. , 45 U.S.L.W. 3247 (No. 75-1452, October 4, 1976), "for want of a substantial federal question" does not compel conclusions contrary to those urged here. This Court has cautioned that the precendential weight to be accorded to summary dismissals depends upon what constitutional issues were "properly presented" to this Court and the "reach and content" of the dismissal of those issues. *Hicks* v. *Miranda*, 422 U.S. 332, 345 n. 14 (1975). These determinations in turn depend upon the *ratio decidendi* of the lower court's opinion. *Honeyman* v. *Hanan*, 300 U.S. 14, 18 (1937).

The lower court in *Kimbell* (and in *Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission*, 88, NM 596, 544 P.2d 1161 (1975), relied upon by that court in its *Kimbell* opinion) rested its decision to grant unemployment benefits to strikers solely upon non-federal statutory interpretation grounds. Consequently, the lower court in *Kimbell* did not consider the questions presented here, including those involving federal labor policy and state neutrality in labor disputes.

Moreover, state courts which *have* considered the issues here have reached conclusions consistant with those urged here. In *John Hancock Mutual Life Ins. Co.* v. *Commissioner of Ins.*, 349 Mass. 390, 208 N.E.2d 516 (1965), the Supreme Judicial Court of Massachusetts voided state legislation permitting policyholders an additional grace period if the company's collecting agents went on strike (208 N.E.2d at 524-25):

> " . . . the legislation under consideration . . . gives the union a potent weapon which cannot fail unilaterally to restrict the desired bilateral freedom of collective bargaining, left free by Congress for the operation of economic forces. For the state to intrude into such an area designed to be kept free is as much a violation of federal policy as it is for a state to attempt to regulate rights or duties specifically protected by the federal acts."

Second, when the Social Security Act was enacted in 1935, Congress was not legislating against a background where employees idled because of a labor dispute involving their employer were receiving state unemployment benefits.[12] Accordingly, there was no apparent reason to mandate the curtailment of such payments. *Third*, the National Labor Relations Act was enacted one month prior to the Social Security Act.[13] It is reasonable then to consider the Social Security Act in light of the policy of state neutrality manifested in the Labor Act. Indeed, the Social Security Act itself reflects concern with state neutrality in labor disputes. Thus, Congress in that Act provided against the possibility that unemployment compensation would become a financial incentive for the

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[12] Prior to 1935 only Wisconsin had legislated an unemployment benefit program. However, the implementation of this program was delayed and ultimately abandoned pending consideration by Congress of the federal system of unemployment compensation. R. Hoar, *Wisconsin Unemployment Insurance*, 1934.

[13] The Wagner Act became law on July 5, 1935; the Social Security Act became law on August 14, 1935.

unemployed to become strike breakers, by forbidding benefits to be withheld where claimants refuse employment which required them to become replacements for striking employees or to work at substandard conditions or to refrain from joining a *bona fide* labor organization. 29 U.S.C. 3304(a)(5).[14] Since Congress implemented its determination that states remain neutral in labor disputes by forestalling the use of the Social Security Act to weaken the bargaining position of unions, it is reasonable to conclude that it would have also rejected any attempt to use unemployment benefits to disadvantage employers as well. As shown above, payment of these benefits to persons idled due to a labor dispute would weaken an employer's bargaining position; accordingly, the denial of such payments is consistent with the federal social security scheme. *Fourth*, in *Burns* v. *Alcala*, 95 S.Ct. 1180, the Court held that the failure of Congress to expressly exclude—by legislative amendment to the Social Security Act—unborn children from AFDC benefits did not indicate approval of their eligibility. In view of Congress' overriding concern for state neutrality in labor disputes, and the fact that provision of unemployment compensation for those idled because of a labor dispute would disadvantage an employer, the failure of Congress to expressly disqualify these persons from receiving compensation cannot be taken to show Congressional approval that they should qualify as recipients.

The upshot is that the labor dispute disqualification in this case is permitted—indeed required—by the Social Security Act since it furthers the fundamental Congressional purpose of state neutrality in labor disputes.

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[14] Without this provision, the Social Security Act could have become a tool to weaken unions at the bargaining table.

CONCLUSION

For the foregoing reasons, the *amicus* urges that this Court reverse the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,

Appellants

VS.

LEONARD PAUL HODORY,

Appellee

On Appeal from the United States District Court For the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF ON THE MERITS, BY REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF ON THE MERITS, BY REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

Republic Steel Corporation respectfully moves for leave to file a brief Amicus Curiae on the merits in this case pursuant to Rule 42(3). Attorney for Appellant has consented to filing of such a brief, attorneys for Appellee have not. Its brief is in support of the position of Appellant.

A motion by Republic Steel Corporation for leave to file a brief as Amicus Curiae on the jurisdictional issue was allowed by the Court and its brief was duly filed with the Court.

Republic Steel Corporation has an interest in this case. The decision of the Three Judge District Court allowed unemployment benefits to some five hundred eighty of its employees, included as a part of the class with Hodory, Appellee herein, whose claims for benefits had been denied by the Administrator of the Ohio Bureau of Employment Services.

Under Ohio law, (Sec. 4141.28 (G) (4) R.C.) benefits paid to Republic Steel Corporation's employees are charged to its account with the Bureau and under the state's experience rating system will be paid by Republic Steel Corporation through an increase in its payroll tax for unemployment compensation.

The decision of the Administrator of the Ohio Bureau of Employment Services denying benefits to the Plaintiffs-Appellees was appealed to the Board of Review where the claims are now pending but are being stayed pending a final decision in this case.

Republic Steel Corporation is an interested party in these cases now under appeal with the Board of Review. (Sec. 4141.01 and Sec. 4141.28 Revised Code of Ohio).

Appellees have an adequate remedy under state law which they have not exhausted.

Republic Steel Corporation was not made a party in the instant case, was denied an opportunity to appear and present evidence as to the economic impact on it resulting from the payment of benefits and was not permitted to intervene. This constitutes a denial of procedural due process under the Fifth Amendment.

The provision contained in Sec. 4141.29 (D) (1) (a) Ohio Revised Code denying benefits to claimants whose unemployment is due to a labor dispute is a reasonable exercise of the police power of the state.

The Ohio Legislature, in exercising its choice of beneficiaries under the state unemployment compensation program, denies benefits to individuals who are unemployed due to a labor dispute even though such persons are not actually participating, financing or directly interested in the dispute. This fulfills a legitimate and reasonable state purpose and maintains the state's neutrality in labor disputes.

Increased benefit payments to a class of beneficiaries not now contemplated in the state law would unjustly increase the tax burden on employers and could jeopardize the solvency of the Ohio Unemployment Trust Fund.

Although Republic Steel Corporation supports the arguments and conclusions contained in the excellent Brief of the Attorney General on behalf of the appellants herein, the interests of the Bureau of Employment Services cannot be the same as that of the Republic Steel Corporation, and therefore its interests are not adequately represented by the Appellants in this case.

The principle that a governmental agency cannot adequately represent the interests of a private party has been expressed in the case of *Trbovich v. United Mine Workers*, 404 N.S. 528, at 538 (1972).

For the foregoing reasons, Republic Steel Corporation respectfully requests that this motion for leave to file a brief on the merits as Amicus Curiae be granted.

Respectfully submitted,

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BRIEF OF REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

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Appellee

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

BRIEF OF REPUBLIC STEEL CORPORATION AS AMICUS CURIAE

This Brief is submitted on behalf of Republic Steel Corporation as Amicus Curiae pursuant to leave granted by the Court on October 4, 1976. It supports the position of the Appellants, Ohio Bureau of Employment Services and Albert G. Giles and seeks such further relief for Republic Steel Corporation as the Court may deem appropriate.

I. STATEMENT OF THE CASE

This case involves the constitutionality of Sec. 4141.29 (D)(1)(a) of the Ohio Revised Code. This Section, (quoted in its entirety in the Appendix to Appellant's Jurisdictional statement at page 34), denies benefits to a claimant if his unemployment is due to a labor dispute (other than a lockout) at any factory, establishment, or other premises, located in this or any other state, owned or operated by the employer by whom he was last employed. The disqualification continues so long as his unemployment is due to such labor dispute.

As a result of a national strike in 1974 by the United Mine Workers at coal mines owned and operated by Republic Steel Corporation and United States Steel Corporation, these companies were forced to lay off large numbers of workers in their steel plants in Ohio.

Claims for unemployment benefits were filed with the Ohio Bureau of Employment Services and the claims of Hodory, the Appellee in this case, along with some 1,250 other claimants were denied by the Administrator on the ground that their unemployment was due to the labor dispute.

A Legal Aid Organization filed the present class action on behalf of Appellee and the other some 1,250 claimants who were similarly situated, whose claims for unemployment benefits were denied, claiming that the provision denying benefits contained in Sec. 4141.29(D)(1)(a) is unconstitutional by denying equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution.

Neither Republic Steel Corporation nor United States Steel Corporation was named a defendant in

this action in spite of the fact that they are interested parties in these cases pending before the Board of Review and are necessary parties in any further action in these cases in the state courts.

The United States District Court convened a three judge panel which heard the case and in a Memorandum Opinion and Order on March 5, 1976 held:

(1) That a class action was proper,

(2) That the defendants had failed to demonstrate that the classification contained in 4141.29(D)(1)(a) denying benefits for unemployment due to a labor dispute did not violate the Equal Protection clause of the 14th Amendment of the United States Constitution, and

(3) That the defendants had failed to demonstrate that the application of Sec. 4141.29 (D)(1)(a) bears a real and substantial relation to a legitimate state purpose, and therefore as applied in this case to deny benefits to individuals who were unemployed through no fault of their own and who neither participated in nor benefited from the labor dispute involving another union, violates claimant's right to due process under the 14th Amendment and 42 U.S.C. Sec. 1983.

II. REPUBLIC STEEL CORPORATION HAS A SUBSTANTIAL FINANCIAL INTEREST IN THIS CASE.

If the decision of the Three Judge District Court is allowed to become final, unemployment benefits will be paid to some five hundred eighty of Republic Steel's

employees who are included as a part of the class with Hodory, Appellee herein.

These claims for benefits were denied by the Administrator of the Ohio Bureau of Employment Services and are now pending on appeal with the Board of Review of the Bureau but action by the Board is being stayed pending a final decision in this case.

The period involved consists of nine weeks from November 11, 1974 through January 11, 1975 during which there was unemployment due to a strike in the coal mines owned and operated by Republic Steel Corporation.

Only an estimate of the amount of money involved in these claims can be made based upon the following facts and assumptions.

(1) The average Ohio weekly benefit check in the steel industry is $98.

(2) There were 580 claims filed by employees of Republic Steel involved in this class action whose claims were denied. Multiplying the 580 claims by $98, times eight weeks (allowing for one week waiting period) results in $454,700.

Under the experience rating provisions of the Ohio law (Sec. 4141.24(D)(1) R.C.) unemployment benefits paid to Republic Steel's employees are charged to its account with the Bureau and are paid for by Republic through an increase in its state payroll tax for unemployment compensation.

Republic Steel Corporation is made an interested party to these cases now pending with the Board of Review and under Ohio Revised Code Section 4141.28(O) becomes an Appellee in any further action in the state courts.

The impact of the decision in this case in future cases which may arise is purely speculative, but given the realities of past experience in this area of labor disputes, it is safe to say that the results will be important and far reaching.

III. ARGUMENT

Forty years ago this court, in holding constitutional Title IX of the Social Security Act and the Alabama Unemployment Compensation law, removed the last obstacle in the development of a comprehensive system of state unemployment insurance laws in the United States.

Although it was argued that the tax mechanism in Title IX encouraged, enticed or induced (depending on the individual's viewpoint) the states to pass unemployment compensation laws, it cannot be denied that the decisions by this court properly interpreted the intention of the Congress that a state was free to adopt the type of law which best served the interest of its citizens.

All states have adopted unemployment compensation laws and no two are the same. They *are* all state laws, adopted by state legislatures, administered by state employees and the benefits payable under such laws are financed by a state payroll tax on employers.

For the first time since that historic year of 1937, a Federal Court has held unconstitutional a provision in a state law denying unemployment benefits for unemployment due to a labor dispute.

According to the "Jurisdictional Statement" by the Appellants, this decision by the Federal District Court was based upon a hearing on the jurisdictional question without opportunity to submit evidence on the merits and without notice to U.S. Steel Corporation

or Republic Steel Corporation whose employees were involved and who were "interested parties" in a pending proceeding on this issue before the Board of Review of the Ohio Bureau of Employment Services. (Page 8 Jurisdictional Statement)

A. THE PROVISION OF R.C. 4141.29(D)(1)(a) DENYING BENEFITS TO CLAIMANTS UNEMPLOYMENT IS DUE TO A LABOR DISPUTE IS A REASONABLE EXERCISE OF THE POLICE POWER OF THE STATE.

The first time this court spoke on the subject of the right of choice of beneficiaries by a state legislature in the field of unemployment compensation was in the opinion delivered by Mr. Justice Stone in May, 1937 in holding the Alabama Unemployment Compensation Act constitutional. *Carmichael v. Southern Coal Co., et al.*, 301 U.S. 495, 57 S. Ct. 868 (1937).

The opponents of the law contended that the choice of beneficiaries was so arbitrary and discriminatory as to infringe the 14th Amendment and deprive the statute of any public purpose.

The court rejected this argument and held that a state unemployment system "is not bound to occupy the whole field."

In all states there are conditions and circumstances where the state legislatures have elected not to allow unemployment benefits. For example, when these laws were first enacted, employees of employers of less than eight employees were excluded as were agriculture workers, employees of state and local governments, etc. A three weeks waiting period was required in most states.

Over the years, refinements have been made by the various states and coverage of programs extended to

additional groups of workers, all within the framework of the Constitution.

On the same day that this court announced its decision in the *Carmichael* case, (May 24, 1937) it also decided the case of *Steward Machine Co. vs. Davis*, 301 U.S. 548, 57 S.Ct. 883, upholding the validity of the federal unemployment tax under Title IX of the Social Security Act.

On the subject of classification and exemptions Mr. Justice Cordizo delivering the opinion of the Court stated:

> "The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. This is held in two cases passed upon today in which precisely the same provisions were the subject of attack, the provisions being contained in the Unemployment Compensation Law of the State of Alabama." (Citations omitted)

The *Steward Machine Co.* decision stresses the fact that under the Federal Social Security Act the taxpayer and the states are not coerced; that the powers of the states are unimpaired; and that in fact a state is not bound to keep its law in effect.

There is ample evidence therefore that Congress intended that a state, in adopting an unemployment compensation law was free to fit its law to the particular conditions existing in the stat , which in the discretion of the state legislature, l st served the interest of its citizens.

At the time the validity of the Alabama Unemployment Compensation case was decided by this court in 1937, that law contained the following provision with respect to the denial of benefits for unemployment caused by a labor dispute:

> "Sec. 6 . . . an employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed."

It should be noted that when the constitutionality of the Alabama law was upheld by this court, there were no exceptions to the disqualification in the above provision because such employee was not participating, interested in or financing the labor dispute or did not belong to the same union which was a party to the dispute. If his unemployment was "directly due to the dispute" the denial of benefits was absolute. Refinements only came later by legislative action and not through constitutional compulsion.

The first Ohio unemployment compensation law enacted in December, 1936, contained a similar provision:

> "Sec. 1345-6 c, O.G.C. No benefits shall be payable to any individual who has lost his employment or has left his employment by reason of a strike in the establishment in which he was employed, as long as such strike continues; . . ."

Subsequent legislatures amended this Ohio provision substituting "labor dispute" for "strike," making an exception to the disqualification in the case of a "lock out" by the employer and expanding the meaning of "establishment" to include any factory, establishment

or other premises located in Ohio or any other state owned or operated by the employer. The basic concept of denying benefits to employees whose unemployment is due to a labor dispute has remained intact up to the present time.

The principle of law involved in this case is the right of a state legislature to refine and change these classifications of beneficiaries under its unemployment compensation program in a reasonable manner.

B. THE OHIO LABOR DISPUTE PROVISION HAS REMAINED RELATIVELY INTACT SINCE ITS INCEPTION IN 1936 AND HAS BEEN CERTIFIED EACH YEAR BY THE U.S. SECRETARY OF LABOR AS IN CONFORMITY WITH THE FEDERAL LAW.

Since the original unemployment law was first adopted, the validity of the labor dispute disqualification has not been seriously challenged and has been successfully administered by the state agency in the many cases coming before it.

Although this court has not heretofore, to our knowledge, had the question of the validity of this provision of the Ohio law before it, other actions by the court would seem to affirm the views expressed by the court in 1937 as to the right of a state legislature to choose a reasonable classification of beneficiaries for unem-

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(Note: Effective December 2, 1975, the Ohio legislature further amended this provision of the law confining the disqualification to employees at the establishment in which the labor dispute existed but lifting the disqualification of employees in other establishments if it is shown that they were not financing, participating in, or directly interested in the labor dispute. Not being retroactive in effect, this recent amendment is not pertinent to a determination of the instant case).

ployment compensation without interference by the federal government. For example, in the case of *Abernathy v. Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d, 292 (1963) this court denied certiorari in an appeal from the decision of the Supreme Court of North Carolina on December 2, 1963, 375 U.S. 161.

The North Carolina Supreme Court had before it the question of the validity of a provision in the North Carolina Unemployment Compensation law which denies benefits in labor dispute cases under situations almost identical to those in the instant case.

The *Abernathy* case arose in 1963 several months after the North Carolina General Assembly amended its labor dispute provision, effective July 1, 1961, to read as follows:

> "An individual shall be disqualified for benefits . . .
> "(4) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the

> plant, factory, or establishment of the employing unit." (G.S. 96-14(4) N.C.)

It is important to note that at the time the instant case arose the Ohio law provided that no individual may serve a wait-period or be paid benefits for any week with respect to which the administrator finds that:

> "(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor disputes." (Sec. 4141.29(D)(1)(a) Ohio Revised Code.)

The similarity of purpose of the two laws is obvious even though slightly different language is employed.

It is also important to note that prior to its amendment effective July 1, 1961, the North Carolina labor dispute provision did not deny benefits if it were shown that the individual was not participating, financing or interested in the labor dispute.

Approximately a year after its enactment on July 1, 1961, this amendment was challenged in the North Carolina Courts on the grounds that it constituted an unlawful discrimination in violation of the State and Federal Constitutions—the same grounds that are being advanced in the instant case.

The Supreme Court of North Carolina in upholding the validity of the amendment in question stated in pertinent part:

> ". . . in passing the 1961 amendment the North Carolina General Assembly acted within its con-

stitutional powers. 'When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form it own judgment and its action within its range of discretion cannot be set aside because compliance is burdensome' . . . (Citations omitted)

"The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. The further disqualifications contained in the 1961 amendment involves a question of degree and not of principle."

As noted above, this court denied certiorari December 2, 1963. U.S. Sup. Ct. 375 U.S. 161.

Appellee's claim for relief under 42 U.S.C.A. 1983 is not well founded. As stated in the case of *Ortega v. Rogen*, 216 F. 2d. 561, (Cert. denied 349 U.S. 940) (1954) it was held by the U.S. Court of Appeals, Seventh Circuit that 42 U.S.C.A. 1983 only "gives an action for deprivation of due process and not for denial of equal protection." (Citations omitted) This decision further held that "a cause of action arises under this section only when a right created by the Federal Constitution or laws has been violated. Violation of a state law is not sufficient."

The case of *California Department of Human Relations v. Java et al.* 402 U.S. 121, 91 S. Ct. 1347, (1971) had nothing to do with the qualification for benefit rights. This case merely states that once benefits are determined to be due a claimant, benefits should be paid forthwith and should not be suspended upon an appeal being filed, but only after an evidentiary hearing is held and benefits denied as a result of such hearing. The constitutional question was never reached in *Java.*

Recent proceedings in the Congress indicate its continued support of the right of a state legislature in this area of disqualifications. In failing to enact the proposed legislation proposed by President Nixon in 1969, that the states be required to deny unemployment benefits to strikers, Chairman Mills of the House Committee on Ways and Means explained on the floor of the House:

"We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people . . . For example, there are two states . . . which will pay unemployment benefits when employees are on strike . . . If the State wants to do it we believe they ought to be given latitude to enable them to write the program that they want." 115 Cong. Rec. 34106 (1969) *Grinell Corp. v. Hackett*, 475 Fed. 2d. 445 at 455.

Further the Senate Finance Committee Report in explaining H.R. 14705 contained this statement:

"It would not prevent a State from specifying the conditions for disqualification such as, for refusing suitable work, for voluntary quitting, for unemployment due to a labor dispute in the worker's plant, etc. *Grinell*, supra.

C. IN EXERCISING ITS CHOICE OF BENEFICIARIES, THE LEGISLATURE, IN DENYING BENEFITS TO INDIVIDUALS WHO ARE UNEMPLOYED DUE TO A LABOR DISPUTE, EVEN THOUGH SUCH PERSONS ARE NOT ACTUALLY PARTICIPATING IN THE DIS-

PUTE, FULFILLS A LEGITIMATE, REASONABLE AND ESSENTIAL STATE PURPOSE.

The lower court has injected into this case the element of fault on the part of the individual as a necessary showing in order to deny benefits.

On page 8 of its Memorandum Opinion and Order the District Court referring to the disqualification provisions in Sec. 4141.29 of the Ohio law stated:

> "That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through no fault of their own."

The lower court failed to perceive the many other types of unemployment where benefits are denied where "fault" has nothing to do with their ineligibility for benefits. To itemize a few in effect at the time this case arose:

(1) The unemployment of agricultural workers; of domestic workers; of commission salesmen; of independent contractors; of teachers during summer vacation months,

(2) Unemployment due to sickness, inability to work and unavailability for work,

(3) Unemployment of an elected official or other government employee not in the classified service,

(4) Unemployment of an individual employed by his son, daughter or spouse or a person under 18 years of age employed by his father or mother.

(5) For many years—unemployment due to "an Act of God."

Surely it cannot be said that these types of unemployment are due to the "fault" of the individual.

Now comes the Appellee, some forty years after the enactment of this state unemployment compensation law, and asks this court to change the whole concept of its law. Apparently, as they conceive it, there would be a basic, inherent, God given right to benefits for all types of unemployment, unless it is shown that the individual is at fault. Fortunately this has not been the concept of this court and any step in this direction would be unfortunate for the program.

There is no contractual right to benefits in all cases, as stated by this court in the case of *Fleming v. Nestor*, 363 U.S. 603, 610. That case involved a claim for Social Security benefits where the fund is financed in part by a payroll deduction from the employee. This court stated:

> "We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process clause of the Fifth Amendment. . . .
>
> "Particularly when we deal with a withholding of a non-contractural benefit under a social welfare program such as this, we must recognize that the Due Process clause can be thought to interpose a bar *only if the statue manifests a patently arbitrary classification, utterly lacking in rational justification.*" (Emphasis added)

This reasoning should apply with even greater strength to the state unemployment program which

is financed entirely by a tax on the employer's payroll with no contribution by the employee.

We fully recognize the fact that there are situations so violative of rights guaranteed by the Constitution as to warrant intervention by a federal court in a state's proceedings.

Such an area was described in the relatively recent case of *Huffman v. Pursue, Ltd.*, 401 U.S. 592 in which case the court refrained from enjoying a pending proceeding in a state court in a civil case, applying the same principle of abstention it had stated in a criminal case in *Younger v. Harris*, 401 U.S. 37, but then added:

> "*Younger* and its Civil Counterpart which we apply today do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass, or is conducted in bad faith, or where the challenged statute is flagrantly and patently violative of express constitutional prohibitions in in every clause, sentence and paragraph, and in whatever manner and against whomsoever an effort might be made to apply it."

Clearly the present case does not fall into this category of cases justifying intervention described in *Younger*.

An attempt is made to distinguish it from *Younger* because in this case the injunction is against the Board of Review of the Ohio Bureau, a quasi-judicial tribunal whose decision is necessary for an appeal to the state courts.

The Appellees have not exhausted their remedy in the state courts and by pre-judging what the decision in the state courts will be, it is tantamount to denying

jurisdiction by the state courts conferred by the statute.

The action by the lower court is no different in effect from enjoining a proceeding in the court itself, since in either case its jurisdiction has been denied.

We think the more appropriate view in this case is that expressed in *Younger*.

> "This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin proceedings in state courts is not to issue such injunction."

The lower court concedes there are legitimate reasons for the denial of benefits to the unemployed members of the union *involved* in the labor dispute. This is recognition of the fact that the payment of benefits to strikers affects the bargaining process by greatly reducing the economic pressure upon them for reaching an agreement.

The United States District Court, District of Hawaii, recently struck down the Hawaii law that allowed benefits for unemployment due to a strike on the ground that such payments violated the state's obligation to remain neutral in such cases. The court made this pertinent statement:

> "Employer and employees alike have a right to the benefit of every privately furnished economic weapon available in implementing their respective bargaining position in carrying on or opposing a strike.
> . . . Unless . . . there is an overriding state interest, a state may not assist either party in a labor dispute . . ." *Hawaiian Telephone Co. v. State of*

Hawaii Dept. of Labor and Industrial Relations, U.S. Dist. Ct., Dist. of Hawaii, Civil No. 74-140 (10/1/1975.)

This court denied certiorai in the *Abernathy* case supra in which the Supreme Court of North Carolina had upheld the constitutionality of its state law which denies benefits in cases where the unemployment is caused by a labor dispute at another place, either within or without that state, if owned or operated by the same employer and which supplies materials or services necessary to continue the employer's operations — the exact conditions prescribed in that portion of the Ohio law now in dispute. The North Carolina Supreme Court noted that the power of the state's legislature to provide numerous other disqualifications was not challenged and that

> "The further disqualification contained in the 1961 amendment involves a question of degree and not of principle."

No further explanation is needed of the fact that unemployment benefits, paid to an employer's employees during a labor dispute, whether such employees are participating in the dispute or are merely unemployed because of the dispute, are charged to the employer's experience rate account with the state agency administering the law.

It is also well established that under this system of experience rating, employers are required to contribute to the state unemployment fund, in the form of a payroll tax, approximately the amount of benefits that are paid to their unemployed workers, up to the maximum rate which presently is 4.8% in Ohio. This is one of the reasons the employer is made an "interested party" in all proceedings where the right to benefits are involved. This financial stake in the payment of benefits also provides the employer with the incentive to reduce unemployment, to stablize his employment and to assist in policing a broad and complex system which is open to abuse.

In our memorandum in support of our motion for leave to file this brief as Amicus Curiae, we stated that if the state imposes an increased payroll tax on an employer because of a labor dispute with which he otherwise would not be burdened, it is not remaining neutral. This is true whether the increased tax results from benefits being paid to those employees actually participating in the dispute or from benefits to other of his employees not participating, but whose unemployment is due to the dispute. It is the financial hardship which the state would impose upon the employer which weakens or destroys his ability to bargain on an equal basis, a result which violates the national policy of free collective bargaining embodied in the National Labor Relations Act. (29 U.S.C. 161 et seq.)

For example, take the case of an employer who has two or more unions representing employees in his plant. One of these unions — the smaller one — goes out on strike necessitating closing down the entire plant. If the employer is burdened by paying the cost of unemployment benefits to the large group who may not be participating in the dispute, but who are unemployed because of the strike, then there comes a time — and not too long a time — when those at the bargaining table representing the employer are confronted with the fact that the cost of unemployment benefits exceeds the costs of the items at the bargaining table. The result is obvious — no free collective bargaining.

It is argued that the members of the non-striking union were not at fault but were innocent bystanders. We respond by asking if the employer was at fault? He might also be the innocent bystander.

If this issue is to be determined by the "fault" or "lack of fault" of the parties to a labor dispute, then the state administrative agency would be forced to analyze the merits of every labor dispute in order to place blame, an area in which the state agency has no jurisdiction and should not attempt to invade.

It is also argued that employees who are unemployed due to a labor dispute but who are not interested in the dispute should be entitled to unemployment benefits.

In the example we cited where there are two or more unions representing employees in an employer's plant, an increase in wages or fringe benefits or improvements in other conditions of employment negotiated by one union inevitably leads to a comparable increase for other employees. Many employers have a policy that increased wages negotiated in a union bargaining agreement will be followed by an increase for the office, clerical, and supervisory employees. Because of the domino effect of substantial increases granted to the members of one union at the bargaining table the distinction between those "interested" and those "not interested" is a very difficult line to draw. The Ohio law avoids this difficult problem by denying benefits to all those employees, of the same employer who is a party to the dispute, whose unemployment is due to the dispute.

We believe the decision of this court in the case of *Sproles v. Benford*, 286 U.S. 374 (1932) is responsive to this question. There it is stated:

"To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

"When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is intended to form its own judgment and its action within the range of discretion cannot be set aside because compliance is burdensome." *Standard Oil Co. v. Marysville* 279 U.S. 582; *Price v. Illinois* 238 U.S. 446; *Hudachick v. Los Angeles* 239 U.S. 394; *Euclid v. Ambler Realty* 272 U.S. 365; *Zahn v. Board of Public Works*, 274 U.S. 325.

It has been noted that the labor dispute disqualification provision in the Ohio law was amended effective December 2, 1975. (Sec. 4141.29(D) R.C.)

As amended, benefits are still denied to all employees whose unemployment is due to a labor dispute and who are employed at the same establishment at which the labor dispute exists, (regardless of participation, interest, etc.). However, if an employee is employed at some *other* establishment of the employer and if it can be shown that such employee was not financing, participating in, or directly interested in such dispute he will not be denied benefits because of the dispute.

This is the first time in the long history of this provision that the Ohio legislature, in exercising its choice of beneficiaries, has decided not to deny benefits to employees in a different establishment than the one where the dispute exists, based upon lack of interest, participation or financing.

For the above reasons the question presented here is not moot. The decision will affect all those involved

in this case whose benefit rights were determined under the law prior to its amendment, as well as those claims under the amended law who are employed in the same establishment where the labor dispute exists whose unemployment is due to the dispute but who are not participating, interested in, or financing the dispute.

D. INCREASED BENEFIT PAYMENTS TO A CLASS OF BENEFICIARIES NOT NOW CONTEMPLATED IN THE PROGRAM WILL FURTHER JEOPARDIZE THE SOLVENCY OF THE OHIO TRUST FUND.

The Ohio Unemployment Trust Fund has remained solvent during the some forty years of its existance.

The state legislature has broadened the coverage of its program from employers of 8 or more employees in 1936 to one or more today. It now covers some 3.7 million workers compared to 1.3 million at the beginning. Maximum weekly benefits have been increased from $15 in 1939 to $150 today and the duration from 16 weeks to 26 weeks, plus another 13 weeks during periods of high unemployment on a 50-50 financing basis with the federal government.

As the state program has become more comprehensive so has the need for increased payroll taxes. Tax rate schedules were adjusted upward from a top of 2.7% in 1939 to 4.8% today and the tax base increased from $3,000 in 1940 to $4,200 today.

About $698 million of benefits were paid out in 1975 and $180 million collected in contributions with a balance at January 1, 1975, of $294 million, and $238 million on September 30, 1976.

These facts are relevant here, because if large amounts of benefits are paid out to a class of workers not now contemplated in the program, the solvency of

the state fund will be in even greater jeopardy. It may be noted that 21 other states have been forced to borrow from the federal government an estimated $3.2 billion during 1975 and 1976 of which $2.9 billion came from advances from the Federal General Revenue Fund. (U.D. Dept. of Labor Unemployment Insurance Service).

A state's policy of maintaining an equilibrium between insured risks and the amount of premium (contributions) to the fund has been recognized by this court in *Geduldig v. Aiello*, 417 U.S. 484, 94 S. Ct. 2485, (1974).

We have yet to note the possible unfair and unjust consequences which might result from excessive charges to an employer's merit rating account if benefits were to be paid to large numbers of his employees who might become unemployed due to a labor dispute.

The Ohio law provides at Sec. 4141.25(C) for the establishment of a "mutualized account" which, among other items, is charged with the excess negative balance of an employer's experience rating account in excess of 5% of his average annual payroll. Annually the Administrator totals the charges and credits to this account and assesses a uniform tax against all subject employers in an amount necessary to balance this account. This mutualized tax (sometimes referred to as the socialized tax) is added to the tax rate computed on the basis of the employer's own unemployment experience.

It becomes readily apparent that if large deficits are created in employer accounts because of benefits for unemployment due to a labor dispute they will increase the charges to this "mutualized" account and be paid by every other covered employer in the state through

an increase in the mutualized tax, a very unfair and undesirable result — the real "innocent bystander."

Carried a step further, if the floodgates are opened to this type of unemployment benefits, employers' costs will be increased, not only from unwarranted increases in labor rates resulting from loss of employer strength at the bargaining table, but also from payments for "non production" in the form of increased unemployment benefits.

Indubitably prices are increased (if the employer is to stay in business) which fuels the fires of inflation — without doubt our most serious economic problem today.

If the structure of the state unemployment compensation programs is undermined by repeated interference by the federal government in their administration, then it will surely crumble and fall.

If the decision of the lower court is allowed to stand, it will have repudiated the principles enunciated by Mr. Justice Cardozo in the majority opinion of this court in the *Steward Machine Co.* case and by Mr. Justice Stone in the *Carmichael* case. Both of these decisions strongly emphasized the states' right of choice of beneficiaries in their unemployment programs, without interference or coercion by the federal government.

If the state is now coerced into paying benefits to the class of employees involved herein, clearly not intended by the legislature, then other classes will surely fall and further encroachments on administrative functions will follow, signalling the end of state administered laws as they are constituted today. It would justify the apprehensions of two Justices of this Court in their dissents in the *Steward Machine Co.* case.

Mr. Justice Sutherland stated:

> "If we are to survive as the United States, the balance of powers of the nation and those of the states must be maintained. There is grave danger in permitting it to dip in either direction, danger — if there were no other — in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment upon the administrative functions of the states is that greater and greater encroachments . . . will follow."

And in the eloquent words of Mr. Justice McReynolds:

> "The doctrine thus announced and often repeated, I had supposed was firmly established. Apparently the States remained free to exercise governmental powers, not delegated or prohibited, without interference by the Federal Government through threats of punitive measures or offers of seductive favors. Unfortunately, the decision just announced opens the way for practical annihilation of this theory; and no cloud of words or ostentatious parade of irrelevant statistics should be permitted to obscure this fact."

CONCLUSION

The decision of the lower court is the only Federal Court to our knowledge which has even questioned the constitutionality of the labor dispute disqualification provision in the Ohio law.

A law containing this exclusion and many others, was held constitutional by this court in *Carmichael v. Southern Coal Co.*, supra. Evidence that this court has continued to hold this view is found in its denial of Certiorari in the *Abernathy* case in which the North Carolina Supreme Court held constitutional a provision in its law denying benefits under the exact circumstances now at issue in the Ohio law.

The decision of the Three Judge District Court under appeal here, was decided on the basis of a jurisdictional hearing. There was no opportunity for the employers, the state or other interested parties to present evidence or submit briefs on the subject of the legitimate interest being served the state by the labor dispute disqualification, which interest the lower court held was lacking.

We submit that the choice of beneficiaries provided in Section 4141.29(D)(1)(a) is a reasonable exercise of the police power of the state and serves a legitimate state purpose.

We further submit that the payment of benefits to a class of beneficiaries, not contemplated by the legislature, will further jeopardize the solvency of the Ohio Trust Fund; may cause deficits in employer merit rate accounts necessitating undue increases in his payroll tax and the mutualized tax of all covered employers.

The decision of the Three Judge District Court should be set aside and the injunction against the Administrator and the Board of Review vacated.

Respectfully submitted,

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MOTION FILED

JAN 26 1977

IN THE
Supreme Court of the United States
October Term 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

vs.

LEONARD PAUL HODORY,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Motion of Local No. 1375, United Steel Workers of America for Leave to File Brief *Amicus Curiae* in Support of Appellee and Brief *Amicus Curiae*

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October Term 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants

vs.

LEONARD PAUL HODORY,
Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Motion by Local 1375 United Steel Workers of America for Leave to File *Amicus Curiae* in Support of Appellee

Local 1375 United Steelworkers of America hereby respectfully moves for leave to file the attached brief *amicus curiae* on behalf of Appellee in the instant case pursuant to Rule 42 of the Rules of this Court; Counsel for Appellants and Appellee have given consent to the filing of that brief.

INTEREST OF AMICUS CURIAE

Local 1375 is a local union of United Steelworkers of America whose members are employed at Republic Steel Corporation Plant, Trumbull County, Ohio, one of the plants shut down as a result of strike by coal miners at mines owned by the employer. Approximately one half of the members of the class represented by Appellee unemployed as a result of such shutdown are members of Local 1375, the remainder of the class being employees of United States Steel Company, similarly situated as an employer and *amicus curiae* in behalf of Appellants.

While profoundly concerned for the welfare of its members and interested in their obtaining unemployment compensation benefits in the instant case, as in all other cases in which it is properly due, Local 1375 is not in any sense a professional *amicus curiae* and moves for leave as such in this Court for the first time.

In normal course it leaves to its parent organization, United Steel Workers of America, or to the American Federation of Labor and Congress of Industrial Organizations the presentation of legal policy arguments in all appellate courts as *amicus curiae*. Local 1375 assumed that AFL-CIO would fulfill the function of adequate support to appellee's counsel in the instant case. It was not until January 11, 1977 that the Local was informed that the brief tendered for filing by AFL-CIO was without consent of Appellee's counsel, and instead with consent of Appellant's counsel, and that the disposition of this case "suggested" as preferred by AFL-CIO was to vacate the judgment in favor of Appellee, leaving the members of Appellee's class including more than 600 of this local's members to pursue vindication of their rights through the lengthy Ohio administrative system and judicial process more than two years after this litigation had commenced. For reasons set forth in Part I of brief tendered herewith this *amicus curiae* regards such suggested disposition as inimical to the welfare of its members as part of the class and as covertly in support of the position of Appellants, their adversary.

Officers of Local 1375 were informed by Appellee's counsel as recently as January 20, 1977 that leave had been granted for the filing of aforementioned brief of AFL-CIO, and on that day *amicus curiae* engaged counsel to seek leave and tender brief in its behalf as the sole *amicus curiae* in support of the position of its members.

Appellee and his class, in the filing and presentation of the case, in the three-judge court, were refused the services of counsel regularly retained by District 26 United Steelworkers, the supervisor of both this local and the local union representing employers of Ohio Works, United States Steel Corporation. They were there ably represented by present Appellee's counsel, a "store front" legal assistance association without support by local, state or international union organization. Counsel for Appellee are still performing magnificently against the tremendous pressures exerted by the State of Ohio, two giant corporations, the United States Chamber of Commerce and as *amicus curiae* in this case the labor organization of which all members of Appellee's class are bona fide members.

Appellee's counsel has single-handedly defended in brief against all argument delivered by adversaries and avowedly adversary *amici curiae* to the limit of its personnel and material resources. The "suggested" disposition offered by *amicus curiae* American Federation of Labor and Congress of Industrial Organizations was both completely unexpected and completely unwelcome to either appellee's counsel or to this *amicus curiae*. It is, in

reality, a flank attack which is beyond the capacity of Appellee or its counsel to protect against. Apart the need of assistance against a modern Lord Oxford at Barnet or Lord Grey at Northampton, Appellee and his counsel and the three judge panel have no friend among the friends of this Court to speak a word in their behalf. Arrayed against them in this Court, as against two farmers from Michigan some twenty years ago in *National Equipment Rental Ltd vs Zukhent 375 U.S. 311, 11 L. Ed 2d 354*, are the power and talent of the establishment both capital and labor.

THE ISSUE TO BE COVERED IN THIS BRIEF *AMICUS CURIAE*

The primary issue decided by the three-judge court was whether the denial of unemployment compensation benefits to Appellee and his class on the ground that their unemployment was due to a strike at another place by other workers from another union denied them due process, and equal protection of the laws. The equal protection issue has been exhaustively dealt with by the parties and other *amicus curiae* as has the preemption issue and this *amicus curiae* does not for this reason address these issues directly in brief.

The related due process issue, while ably discussed by counsel for Appellee, suffers in its presentation from the very wealth of citation and argument on the equal protection issue which immediately precedes it in brief. This *amicus curiae* desires to point up this related due process issue so that it might not be considered a make weight argument. This issue is dealt with in Part II of our brief.

Before reaching that issue, in Part I of our brief we deal with an issue touched on only obliquely by Appellants in the trial court, then utterly abandoned by them in this appeal. That is the abstention issue raised, improperly we believe, by *amicus curiae* AFL-CIO and argued by it without full and fair discussion of the long history of treatment of related portions of Ohio's unemployment compensation laws by its highest court.

We point out in tendered brief that the purpose of AFL-CIO in intruding the abstention issue, abandoned by Appellants, is to erect a barrier against later review of the action taken in *Kimball, Inc. v. Employment Security Commission*...US....., 45 U.S. L.W. 3247 (October 4, 1976).

However sympathetic this *amicus curiae* may be to the aims and purposes of the New Mexico Employment Security Act and the extremely liberal protection it gives to employees under all

conditions of a labor dispute, New Mexico is far away from Ohio, both geographically and in recently prevailing social philosophy. Erecting some barriers against review of *Kimbeli* may be excellent *haut politique* of our labor establishment, but we would prefer that the barrier not be constructed solely from the rights of our members to serve as a bloody angle at Spotsylvania Courthouse. To sacrifice the present rights of industrial employees in a heavily industrialized and populous state, on the wholly speculative dream that Ohio and forty-five other states will, in the forseeable future, march to the beat of New Mexico's drum of liberal protection is the sort of folly which results from wishful thinking. The suggestion of vacation and remand of a hard earned judgment risks a recent small gain in the standing of many workers on the dubious premise that New Mexico's solutions are the inevitable wave of immediate future. We argue against such folly and against such a dubious premise.

Respectfully submitted,

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Northern District of Ohio Eastern Division

Brief of Local 1375 United Steelworkers of America, as *Amicus Curiae*

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SUMMARY OF ARGUMENT

In Part I of the Brief we examine the claim for application of absention at the appellate level, demonstrating that under the posture of the case at trial level the requisites for absention were not present or reasonably to be expected. In addition we examine, from a pragmatic view, actual interference and friction with the state judicial process and find there is none to date and none to be expected. In addition a brief survey of the Ohio State Administrative process discloses no interference even though absense thereof is not part of the heavy burden carried in decision to refuse intervention and that the abstention issue, as improperly raised by a non-party should be ignored.

In Part II we take up the neglected issue of due process as it appears in this case, demonstrating that the Ohio statute does not meet the tests set forth in *Vlandis and Weinberger* and that therefore the judgment of the Court below should be affirmed on due process grounds alone.

ARGUMENT

I

The issue of abstention, intruded into this case by two non-parties, acting in incongruous concert[1], is based on two primary considerations. The first, most elaborately articulated by this court after Ex parte Young 209 U.S. 123, (1908), in Younger v. Harris 401 U.S. 37, 91 S Ct 746, 27 L Ed 2d 669 (1971) is that of interference with the state's *judicial* process, then ongoing, or the "friction" basis. The second, less expressly put, but touched upon by one of amici in footnote only[2], may be termed the judicial administration basis.

The first of these bases is necessarily thrust upon the trial court for initial judgment in a semi-vacuum. That Court must weigh the factors, not only of present interference, but of future interference if the case becomes a protracted one. In the instant case the three judge panel devoted 40% of the verbiage of a comparatively terse opinion and 80% of its citations of authority in passing on the abstention issue[3], as then raised by present appel-

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[1]The major contribution is made by AFL-CIO as *amicus curiae*, devoting a major part of its brief to the "issue" pp. 2-15 Brief of *Amicus Curiae*, American Federation of Labor and Congress of Industrial Organizations. The principal purpose of the intrusion, *Kimbell Inc. v. Employment Security Commission of New Mexico, 45 U.S. L.W. 3247 (No. 75-1452) and Albequerque - Phoenix Express, Inc. v. Employment Security Commission, 88 NM 596, 544 P 2d 1161 (1975)* is also touched upon in brief of United States Chamber of Commerce, *Amicus Curiae* p. 18 n. 11.

[2]See brief of American Federation of Labor, Congress of Industrial Organizations p. 3-4 note 2: "The reason why the Board of Review has decided to await the final resolution of this case before deciding whether benefits are due either the Hodory class or the other steelworkers assertedly affected by the mine strike (see p. 4, infra) is not stated. While the airing and resolution of the state law questions could affect the merits of the constitutional adjudication (see pp. 13-15, infra) the only reverse effect of the constitutional issues upon the state administrative proceedings we can perceive is that if the order below is upheld it may be unnecessary for the Board to decide certain state law issues".

[3]See text and footnotes of opinion 408 F. Supp. 1018, 1022.

lants. At this stage of the proceedings interference and friction are almost an abstract concept to be resolved on the basis of the individual judge's experience, not only in the field of federal-state judicial relationships but practical background in the substantive field of the individual case and the probable incidence and duration of an existing or potential parallel case in the state system. For this the trial panel in the instant case was uniquely qualified. Two of its members were state court trial judges from the period of litigation of administrative appeals on eligibility of unemployed workers for unemployment compensation, discussed *infra*. One had experience in his own state court with a particularly lengthy and aggravating case of this type[4]. The third, the former executive of Ohio's largest city and a former state legislator, was thoroughly familiar with the machinery of administrative determination of unemployment compensation in laws which he helped, as legislater, to create, and was later Secretary of Health, Education and Welfare, supervising state systems.

The initial judgment of the panel was correct. Neither interference nor friction could have conceivably developed with the *judicial* process, since all cases were bottled up in agency determination in Ohio, where they would have remained for the duration of this case, even had the case not been filed[5]. Under the circumstances of this case there was no interference or any possible interference with the Ohio *judicial* process.

As to interference with the legislative process there was none. Ohio did, as all parties and *amici curiae* have noted, amend its statute (§ 4141.29 (D) (1) (A))[6] to put its qualifications provision in rough conformity with the laws of some forty other states and thus severed its tie with North Carolina medievalism, all during the course of the trial court's deliberations. The existence of the instant case might conceivably have hastened the Ohio General Assembly's action, but there is no evidence in the record that it caused it, or that the General Assembly was even conscious of the need to "beat the court" in avoiding future constitutional conflict.

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[4] Molded Fiber Glass Cases #630-699 Ashtabula County Court of Appeals, discussed p. 7 n. 23 in Order in the Courts, a Report on Time Span or Disposition of Litigation in Six Northeastern Ohio Counties, Knight Foundation, University of Akron, 1970.

[5] See infra p. as to the record of duration, in the administrative channels, of *Nunamaker* and *Leach* cases.

[6] Amendment effective December 2, 1975, See findings 408 F. Supp. 1018.

Was there interference with Ohio administrative action? The probabilities are against it, for as we point out, *infra*, the Ohio administrative machinery might well have taken as long to grind out a result as it did in *Nunamaker*[7] and *Leach*[8].

But while interference and friction are frequently only conceptualisms at trial court level and thus some basis of prediction may be required, that is not at all true at the appellate level. At such level, especially at the level of this Court, interference and friction are not merely discernible, but even measurable. Refusal to abstain has, by the time Notice of Appeal is filed and briefs are in, either produced interference and friction or it has not. In this case there is every evidence that it has not. The best indication comes from counsel for appellants himself. As chief legal officer of the state, he must supply legal counsel to every administrative board, commission and agency of the state, and he must defend the actions of each of them, when challenged, in every state court. Surely he is in the best position to determine the existence and extent of any interference at first instance. He raised the question, obliquely in the second and other defenses set forth in his answer to the complaint. The trial court responded with a measured and considered study of the effects of taking jurisdiction. The decision was one which might be assumed to create the maximum of interference. Yet, nearly two years later, the Attorney General of Ohio does not even mention abstention in his brief. The issue is raised by counsel for two *amici curiae* both from the ivory tower of a federal city five hundred miles away and without the slightest in empirical data to offer, even second hand. It is said that an appellate court, on an issue such as this, has 20-20 hindsight and *amici curiae* have a duty to improve such vision if they can. No effort on the part of those *amici curiae* in this direction is discernible.

The only result of following the suggestion of vacation and remand at this stage of proceedings would be for the Ohio state administrative process to adopt a dual standard of eligibility determination; one for cases arising after December 2, 1975, as to which the liberalized majority rule of eligibility, by current statute, must be followed; the other, including cases of the class represented by Appellee (1250 in number) as to which the old rule must be followed, during the same time frame of adjudication.

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[7] *Nunamaker v. United States Steel Corporation, 2 Ohio St 2d 55 206 NE 2d 206* reversing *Nunamaker v. United States Steel Corporation #4344*, Mahoning County Court of Appeals, unreported but reproduced in Appendix, the time count being make in par. 3 of Court of Appeals opinion.

[8] *Leach v. Republic Steel Corporation*, 176 Ohio St 221 199 NE 2d 3. Time count extracted from unpublished opinion in order in the Courts, supra N. 4 at p. 7 footnote 10.

The second basis for abstention, less commonly articulated, comes from the need to limit access to an overburdened federal district court, or at least to terminate the litigation quickly and on jurisdictional grounds and to avoid the pendency problems of protracted and delicate policy cases. There must be, in a word, either more judges or fewer cases which require final adjudication. This is particularly true of cases which are abstention susceptible since, from the usual need of three judge panels and the former requirement of direct appeal as of right, consume prodigious quantities of judge time and justice time and effort. Once more, this is an important consideration for the district judge who makes the initial determination of need for the three judge court, for the Chief Judge of the Circuit and for the panel itself. The absention issue must be carefully considered, as here it was, at that stage of the proceedings.

But on appeal, particularly to this Court, the same considerations do not apply. By this stage, in this case as in others, the federal facilities have already been used, and the federal judge time and energy substantially consumed. This is true whether the decision not to abstain, as made by the panel, was right or wrong. Nothing can now restore the lost time, energy and facilities used. They are irretrievable. The sole effect of vacating judgment and remanding the case to district court, with instructions to keep it pending while the state judicial process operates, is to add one more case, once disposed of, to the pending docket with every prospect of later expenditure of judicial time and effort in redoing that which has once been done. To those who play the numbers game and the statistical count, this is not merely one more pending case on the trial court docket, but one more component adding to the age of the average or median pending case on the statistics so carefully kept by the Administrative Office of the Courts. While these effects, with one case, may be minimal, considered the mass of cases of this type, the statistical impact is considerable, to say the least.

Of course this result is true in every part of the appellate process, to some degree. But it has special application to cases in which abstention is belatedly invoked. First it means longer pendency on remand, as above noted. Second, and more importantly, it involves failure to use the tool of 20-20 hindsight and to consider on an empirical or pragmatic basis whether the evils of interference and friction have in fact been intruded. If discernible interference has taken place, there is no alternative; the vacation and remand must be undertaken, not withstanding the pyramiding of judicial time and energy loss. But where, as here, there is, on an empirical basis, no discernible friction or interference, such additional judge time down the drain would be a calamity.

Even treating the invocation of abstention on a traditional abstract basis, the decision in the instant case should be the same. The test employed by the three judge panel in its memorandum opinion was sound. The court reasoned correctly that abstention applied primarily to cases in which there was an ongoing *judicial* proceeding and that the heavy burden emphasized in *Younger v. Harris, 401 U.S. 37, 91S Ct 746, 27 L. Ed 2d 669* and *Samuels v. Mackell, 401 U.S. 66, 91 S Ct 764, 27 L Ed 2d 688*, did not apply to situations in which only the administrative process was at work. The panel relied primarily on *Huffman v. Pursue, Ltd, 420 U.S. 592, 43 L Ed 2d 482* as its authority. We would have preferred to use *Steffel v. Thompson 415 U.S. 462 39 L Ed 2d 515 (1974)* and the viable remnants of *Dombrowski v. Pfister, 380 U.S. 479, 14 L Ed 2d 22 (1965)* for making the point, since these dealt directly with the administrative problem.[9] This is primarily a matter of selection, however; the principle remains the same. Citation of authority for the suggestion of vacation by its author does not, however, recognize the distinction made so carefully by the panel. Much of its profuse garnering of cases could safely be disregarded, given the state of the record here. The purely prospective court action alluded to by appellants at trial and detailed at secondhand by the suggesting *amicus curiae* simply is not appropriate or in accordance with fact.

These statements on appeal from the agencies to the Court as made[10] would appear to be based on expection, not actuality, since they betray some ignorance of the complications of and politico-economic influence at work to slow down administrative adjudication of unemployment claims under the Ohio scheme. First the administrator makes an initial determination of qualification or disqualification - entitlement or disentitlement to compensation. Then, on appeal, he makes a decision on reconsideration; if further review is requested the matter goes to the Board of Review, where a referee is assigned, takes evidence and ultimately makes a decision; if a claimant or employer is still disatisfied, the matter

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[9] "When no state [criminal] proceeding is filed, federal intervention does not result in duplicative local proceedings or disruption of the state [criminal] justice system". *Steffel v. Thompson*, 415 U.S. at 462, 39 L Ed 2d at 515 (brackets added) See also *Lake Carriers' Assn. v. MacMullen*, 406 U.S. 498, 509 32 L Ed 2d 257.

[10] Brief of American Federation of Labor and Congress of Industrial Organization at p. 4-5 "According to appellants '[t]he steel companies are appealing these decisions in the state courts'. This observation, made at second-hand may well be indicative of future determination not an observation of there present actually. The fact is that in most cases arising under § 4141.29 (D) (2) (A) (1) the employers here involved do, as a matter of course appeal to the Courts in due and leisurely course and in virtually all mass cases do so. See *Leach* and *Nunamaker* n. 6-7 *supra*.

is heard by a three member Board of Review on further appeal. Only when this last stage is completed does appeal to the Courts take place.[11] As noted *infra*, in policy cases such as the claims by appellee's class, to progress from the first to the fourth step in the administrative process not uncommonly takes up to two years time.

Both the administrator and the Board of Review are subject to executive appointment in Ohio and to a degree greater than in many other states are expected to reflect faithfully the politico-economic ideologies of the then current governor. Many of the Bureau of Unemployment Compensation (as then named) cases reaching the courts have coincided in their inception with a change of governors, particularly in 1957, 1959 and 1975.[12]

In cases filed just before inauguration of the governor, of course, the outgoing administrator may allow a claim. In the intervening three or four months which is a minimum for fourth stage action the composition of the Board of Review has changed and now a majority of the members will reflect the opposite point of view. It thus would be predictable that the favorable (to them) decision noted in Appellant's brief and repeated in *amicus curiae's*[13] was that of the outgoing administrator, and would have been almost automatically reversed by the Board of Review, had the cases proceeded in normal course and not, as reported,[14] been halted to await outcome of this case. Thus it is most improbable that a different result for the "other large group of steelworkers laid off at the same time by the same steel companies assertedly for the same reason" would, at the end of the administrative process, have occurred. Thus there was no probable variant result due to any unclearness (to Ohio's authorities at least) as to what constitutes unemployment "due" to a labor dispute. [15] A substantial predicate for abstention thus did not, in fact, exist.

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[11] An expedited access to the Courts, together with a by-pass of the lower state Courts, is provided by § 4141.28 (N) Ohio Revised Code in certain circumstances. It would appear, however, that each of steps detailed above must be followed for a representative case. It does not appear that this procedure was followed in related cases since no mention is made in briefs of any actual or intended certification of any case to the Supreme Court of Ohio as contemplated by § 4141.28 (N) Ohio Revised Code.

[12] *United Steel Workers v. Doyle* 168 Ohio St. 324, 154 NE 2d 623 (1958) (Supplemental Unemployment Benefits) arose in 1967-58; *Leach v. Republic Steel* 176 Ohio St 221 199 N E 2d 3, (1964) (Tidying up after strike) in 1959; *Nunamaker v. U.S. Steel Corporation* 2 Ohio St 2d 55 206 N E 2d 206 (1965) (Vacation pay) in 1960; the instant case in 1974.

[13] American Federation of Labor and Congress of Industrial Organization Brief p. 4-5.

[14] Jurisdictional Statement, at 6.

[15] American Federation of Labor and Congress of Industrial Organizations Brief at 5-6.

A subsidiary claim made for pronouncement of abstention at this level: that the Hodory class's ultimate success might well have been achieved without application of a constitutional issue and upon a statutory interpretation basis[16] seems most unlikely. The collection of Ohio cases[17] upon which it is based, and carefully prefixed with the appropriate but uninformative "See's cf's" of the best Ivy League law journal uniform citation style, add up to one conclusion: the "due to labor dispute" with one minor exception from a rural county general jurisdiction Court[18] has received a uniform application by all Ohio Courts of Appeals and its Supreme Court. Under all circumstances reported the "due to" clause was interpreted broadly and the disqualification was pronounced.

The demonstrated record of the Supreme Court of Ohio in interpreting sections of Ohio's Unemployment Compensation law, related to or predecessors of § 4141.29 (D) (1) (A) destroys any possibility of unclearness or ambiquity of the statute as locally interpreted or any amelioration of its strict disqualification provisions. The record extends over twenty years of strict construction and absolute disqualification for benefits.

The first of these cases, *United Steelworkers v. Doyle, 168 Ohio St. 324, 154 NE 2d 623 (1958)*, was concerned with whether receipt of supplemental unemployment benefits, pursuant to union management contract, was a disqualifying or benefit reducing factor in the receipt of state unemployment compensation payments. The administrator required deduction of the "private" payment in determining the amount due claimant. Referee and Board of Review affirmed this administrative determination. On appeal to the Courts both the Court of Common Pleas and the Seventh District Court of Appeals ordered payment of the state amount in full, without deduction. In both courts the employers[19] supported the steel workers' (claimants) position. Notwithstanding, with only the then administrator of workman's compensation represented by the Attorney General of Ohio[20], opposed to full

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[16] id at 6-9.

[17] *Cornell v. Bailey*, 163 Ohio St 50, 125 NE 2d 323 (1955); *McGee v. Timken Roller Bearing Company* 161 NE 2d 905 (1956); *Baumgarte v. Board of Review*, 186 NE 2d 146 (1961) and *Leach v. Republic Steel Corporation* 176 Ohio St 221, 199 NE 2d 3 (1964) to this list should be added *Adamski v. State Bureau of Unemployment Compensation* 108 Ohio App. 198, 161 NE 2d 907 (1956).

[18] *Baumgarte v. Board of Review*, 186 NE 2d 146, arose in Delphos, Allen County, Ohio and revolved around labor dispute with Fruehauf, whose primary plant was in Avon Lake, Ohio, more that 100 miles away and in the Cleveland-Canton-Wheeling-Pittsburgh complex. The case was not appealed from the Court of Common Pleas of Allen County and was not officially reported.

[19] Employers who supported the Steelworkers position included the employers in the instate case, Republic and U.S. Steel.

[20] The then Attorney General, through the Court of Appeals proceedings, is now the Chief Justice, Supreme Court of Ohio.

payment, the Supreme Court of Ohio reversed, reverting to the administrator's original position and claiming, over vigorous dissent by two senior members of the Court, that the language of the act absolutely required the determination made. The Ohio General Assembly immediately responded by not only amending the act to permit dual payment in full, but passing emergency legislation to make such payments immediately effective.[21] Commentary on the decision and the prompt legislative reversal of it noted that Ohio and its Supreme Court were in a small minority of four, including North Carolina.[22]

The second case, *Leach*[23], followed within a few years, and concerned the time of unemployment for a very few workers after the settlement of the steelworkers strike in 1959 and the recall of the majority of workers, caused by the asserted need to spend time tidying up the particular department for resumed production. Once more the Court disqualified the claimants from receiving state benefits. It used the apt language from an already repealed by amendment section of the act to justify the disqualification. Once more there was vigorous dissent, pointing out that the language used was from the previous law, not in effect when the unemployment occurred.[24]

Finally in 1965, the Court decided *Nunamaker v. U.S. Steel, 2 Ohio St. 2d 55, 206 NE 2d 206* involving layoffs and contracted for vacation pay as a disqualifying force. Under its union contract the employer was obligated to grant two weeks vacation pay. When layoffs were determined upon each claimant was informed, then asked if he wanted to take his vacation and vacation pay during the week in question and he so elected.[25] The administrator

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[21] See Teple, Supplemental Unemployment Benefits, 20 Ohio St. L J 583 at 584.

[22] Teple, p. cit. n. 21 at 584-5.

"Until the enactment of these benefits Ohio was one of a very few states which had failed to permit the concurrent payment of state unemployment insurance and private unemployment benefits adopted by most of the Ohio employers having supplemental payment plans.

FN 3 "Forty-three states have now taken action permitting supplementation of state unemployment benefits. . .Prior to 1959 only four states had prohibited such supplementation: Indiana, North Carolina, Ohio and Virginia.

at 590

". . .of the four states which adopted a contrary view, North Carolina and Ohio did so by agency rulings". [aided in Ohio's case by the Doyle decision] material in brackets added.

[23] *Leach v. Republic Steel Corporation* 176 Ohio St 221, 199 NE 2d 3.

[24] Gibson J. 176 Ohio St at 224-226, 199 NE 2d 5-6.

[25] For pertinent details of the stipulations and the union-management contract see opinion of the Court of Appeals, Mahoning County 4344, unreported but reproduced in Appendix hereto.

allowed the claims for the weeks in question and on reconsideration confirmed his action. After a two year delay, lasting through the gubernatorial election in 1962,[26] the Board .of Review reversed, disallowing them. The Court of Common Pleas reversed, allowing the claims and the Court of Appeals affirmed this judgment, one member dissenting.[27] On this record the Supreme Court reversed both lower courts, restoring the disallowance entered by the Board of Review, over the dissent of three justices.

Considered such a record of interpretation, disqualifying claimants for state compensation in every case, and twice reversing all lower court decisions to do so, it seems most unlikely that the Supreme Court of Ohio would perform as the suggesting *amicus curiae* indicates.[28] In fact, there seems to be no basis for belief that the Supreme Court of Ohio, at least prior to January 1977 and probably thereafter, would find any uncertain or ambiguous interpretation favoring "another large group of steel workers laid off at the same time by the same steel companies for the same season". They would have received the same ultimate fate of disqualification of claim for the same reason and probably at about the same time from the Supreme Court of Ohio.

The test of amiguity and uncertainty, so necessary for the application of the abstention doctrine, fails in this case and there remains no basis for considering the suggestion of vacation and remand.

II

In large part, the lower Court, the Appellee, the Appellants, and the various *amici curiae* have applied an equal protection analysis to the facts of this case. Yet the Appellee did plead a due process issue in his complaint; the lower court did mention the issue in its Memorandum Opinion and Order; and the issue has received some consideration in the trial briefs, particularly that of the appellee. *Hodory v. Ohio Bureau of Employment Services, 408 F. Supp. 1016, 1022 (N.D. Ohio E.D. 1976); Brief of Appellee, pp. 41-44.* A short review of some of the more significant precedents on this almost forgotten issue clearly demonstrates that the principles enunciated therein alone compel the affirmance of the lower court's decision. Of course, this *amicus* does not mean to imply that the equal protection and due process issues can be "rigidly cabined". *U.S. Department of Agriculture v. Murry*, 413 U.S. 508, 519 (1973) (Marshall, J. concurring).

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[26] See paragraph 3 in Court of Appeals opinion, n 25 supra.

[27] The dissenting judge is now a justice of the Supreme Court of Ohio.

[28] See pp. 9-10 Brief of American Federation of Labor and Congress of Industrial Organizations, *Amicus Curiae*.

As noted by the trial court, the introductory provision of Ohio Revised Code § 4141.29 indicates that the overall purpose of the legislation is to provide benefits to eligible individuals as compensation for the loss of renumeration due to *involuntary* (emphasis) total or partial unemployment. *Hodory, supra,* 408 F. Supp. at 1021.[29] But, it has long been recognized that the specific provision of the legislation challenged by the Appellee disqualifies as beneficiaries individuals who have been "innocently", as well as voluntarily, unemployed, *Cornell v. Bailey*, 163 Ohio St. 50, 58, 25 N.E. 2d 323 (1955). The so-called "innocent bystander" provision or interpretation. It is undisputed that because of the challenged provision, the Appellee and the class of approximately 1250 Steelworkers which he has been permitted to represent were denied unemployment benefits despite the fact that they became unemployed through no fault of their own and despite the fact that they may well have been qualified to receive benefits under all other provisions of the relevant legislation. Under the foregoing circumstances, wherein the effect of the challenged provision was to create a conclusive presumption of voluntary unemployment by eligible individuals when such voluntariness was not universally or necessarily true, and because there exist reasonable alternative means of determining the voluntariness of unemployment this *amicus* believes the decisions in such cases as *Vlandis v. Kline*, 412 U.S. 441 (1973) and *Stanley v. Illinois*, 405 U.S. 645 (1972) are controlling and mandate affirmance of the judgment below.

In *Vlandis*, for example, non-residence was the means adopted by the State of Connecticut to preserve its recognized, legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own residents to attend such institutions on a preferential tuition basis. Supra, at 453. Here, voluntariness of unemployment by otherwise eligible individuals was the means adopted by Ohio to promote its legitimate interests. In *Vlandis*, the provision creating a permanent irrebuttable presumption of non-residence was found to violate the Due Process Clause because it provided no opportunity for a student who applied from out of state to demonstrate that he or she was or had become a bona fide Connecticut resident. Here, the former provision creating a permanent irrebuttable presumption of voluntary unemployment should be found to violate the

[29] While the overall purpose of § 4141.29 did relate to compensation for losses due to involuntary unemployment, it did not cover ineligible individuals. Thus, certain individuals who incurred losses due to involuntary unemployment could not receive benefits because the nature of their past employment. See, for example, Ohio Rev. Code § 4141.01 (B) (3); but see Brief of *Amicus* Republic Steel Corporation, pp. 14-15.

Due Process Clause since it provided no opportunity for an otherwise eligible individual who became unemployed due to a labor dispute at any premise owned or operated by his or her former employer to demonstrate that, as to him or her, the unemployment was involuntary or "innocent". And finally, in *Vlandis*, this Court found that Connecticut could have established such reasonable criteria for in-state status as to virtually insure that students who were not, in fact, bona fide State residents but who had come there solely for educational purposes, could not take advantage of the in-state rates. id. And here, this Court should find that Ohio could have established reasonable criteria for the involuntary unemployment status so that virtually all eligible employees who were not, in fact, involuntarily unemployed, but who had left work voluntarily, could not receive benefits as compensation for loss of renumeration. Compare the provisions of *Conn. Gen. Stat. Rev.*, challenged in *Vlandis*, with the 1972 Opinion of the Connecticut Attorney General Regarding the Non-Resident Tuition. id., at 454. And compare the provision of the *Ohio Rev. Code* challenged herein with *Ohio Rev. Code* § 4141.29 (D) (1) (A) (1) (Page's 1975 Supp.).

It is clear that the Appellee was denied participation in a government benefit program. *Vlandis*, supra. While it may be that this case deals with "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status", the case also does not contain "a somewhat narrow range of situations lacking certain characteristics which might reasonably be thought to establish the genuineness" of the involuntary nature of the unemployment. *Weinberger v. Salfi*, 422 U.S. 749, 772 and 780 (1975). Again, compare the former and present provisions of *Ohio Rev. Code* § 4141.29 (D) (1) (A); and see *Weinberger, supra*, at 802 (Brennan, J., Dissenting). Furthermore, to the knowledge of this *amicus*, nowhere in the record has any one explicitly defended the specific provision in question as a proper method for insuring that benefits are only received by these who are involuntarily unemployed. *Weinberger, supra*, at 776. Undoubtedly, such a defense has not been asserted for no other reason than because the Ohio legislature could not have rationally concluded that the inherent inprecision of the challenged, former statutory provision was justified by the expense and other difficulties of individual determinations on the issue of voluntariness of unemployment. *id.*, at 777. Any such determinations may be neither expensive nor difficult simply because plant-by-plant, rather than person-by-person, considerations may be quite proper in most instances. Brief of Appellant, pp.3-4. Incidentally, it is interesting to note that the heir to the herein challenged provision

apparently requires many individual determinations on the voluntariness of unemployment now faced by Ohio workers in situations quite similar to the relevant situations confronted by the Appellee and the class of Steelworkers he represents. This has not proved any great difficulty in the more than forty states previously making such provision in their laws. Why then, should it be difficult in the State of Ohio?

The Appellants, as well as various *amici curiae*, proffer two major reasons to justify the challenged provision. *Vlandis, supra*, at 448. One asserted governmental interest served by the former provision involves the desire of the State of Ohio to preserve the fiscal integrity of the state Unemployment Compensation fund. The other involves the desire of the state to maintain a position of neutrality in labor matters. Each reason was carefully considered by the lower court with respect to the circumstances of this case; and that court concluded the provision in question was not justified by any legitimate state interest. Thereafter, the appellee ably and extensively reviewed the alleged rationales underlying the provision and their inapplicability to the instant litigation. Accordingly, this *amicus* shall now do no more than simply to urge the Court to find that the permanent irrebuttable presumption of voluntary unemployment created by former provision 4141.29 (D) (1) (A) of the *Ohio Rev. Code* violates the Due Process Clause of the Fourteenth Amendment and thus that the judgment of the District Court must be affirmed.

CONCLUSION

For the foregoing reasons this Honorable Court should ignore the suggestion of untimely application of the abstention doctrine, as made by a non-party, hear the appeal on its merits and affirm the judgment of the three judge court on due process as well as equal protection grounds.

Respectfully submitted,

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APPENDIX TO BRIEF

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JAMES W. NUNAMAKER, ET AL., *PLAINTIFFS-APPELLEES,*	)	OPINION
vs.	)	Case No. 4344
UNITED STATES STEEL CORPORATION, *DEFENDANT-APPELLANT.*	)	

APPEARANCES.

Herschel Kriger, Canton, Ohio, David Clayman, Columbus, Ohio, and Robert M. Murphy, Youngstown, Ohio, for Appellees, James W. Nunamaker, et al.

William B. Saxbe, Attorney General, and Bernard L. Heffernan, Assistant Attorney General, Columbus, Ohio, and Paul W. Zellers, Assistant Attorney General, Youngstown, Ohio, for Appellees, Administrator and Board of Review, Bureau of Unemployment Compensation.

Frank C. Manak, Cleveland, Ohio, and Manchester, Bennett, Powers & Ullman, Youngstown, Ohio, for Appellant, United States Steel Corporation.

Hon. Paul W. Brown,
Hon. James G. France,
Hon. George M. Jones, JJ.

Dated: November 26, 1963

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

UNEMPLOYMENT COMPENSATION
RECIPIENTS OF VACATION PAY

Vacation pay received by laid-off workers in excess of the unemployment benefits will not affect their right to receive such benefits by virtue of the provisions of Section 4141.31 (B-2) Revised Code.

APPEAL - WEIGHT OF EVIDENCE
AGREED STATEMENT OF FACTS

The question of weight of evidence does not arise in a case tried on an agreed statement of facts, which is in the nature of a special finding of facts as agreed upon by the parties.

NUNAMAKER et al v. UNITED STATES STEEL CORPORATION
(1963)

Mah. App. 206

Motion to certify filed: 37 0 Bar 115. Allowed 37 0 Bar 586 Judgment reversed: 20S2 55; 31 00 2 47 2 06 71E2 206.

FRANCE, J.

This case involves the allowance of unemployment compensation for the week of July 3, 1960, to the bulk of the 123 claimants, all employees of United States Steel Corporation at its Ohio Works in this county. As to a few of the claimants the week in question is a later one but no significant difference in the operative facts or legal conclusions occurs.

The Administrator, Bureau of Unemployment Compensation, allowed the claims on various dates in July, 1960, and confirmed such allowance in a decision on reconsideration August 27, 1960.

By letter dated September 2, 1960, but not shown as received until October 4, 1960, appeal was taken to the Board of Review which consolidated the cases and held them before proceeding further for approximately two years. It then received, through its referee, on October 23, 1962, an agreed statement of facts covering all cases and on November 9, 1962, entered decision (one member dissenting) reversing the Administrator's decision and disallowing each and every claim. On appeal to the Court of Common Pleas that Court (Maiden, J.) on June 18, 1963, reversed and vacated the Board's decision and awarded judgment in favor of each claimant for the amount allowed by the administrator. Appeal on questions of law brings this judgment before us for review.

The consolidated case was heard by the Board of Review, and its decision was based, *"upon the file certified* to the Board by the Administrator of the Bureau of Unemployment Compensation *and the agreed statement of facts* entered into between the representatives of the claimant and the representatives of the United States Corporation * * *" (emphasis added).

The facts as so agreed upon and stipulated which are essential to the determination are:

> "4. That during 1960 and 1961 there was an agreement between the United Steel Workers of America and the United States Steel Corporation which governed the employee-employer relationship which agreement is marked 'Joint Exhibit A' and is made a part of this record.
>
> "5. That Section 12 of said 'Joint Exhibit A' deals with vacations and vacation pay.
>
> * * * * *
>
> 7. That shortly prior to the week in issue in each case, each claimant was advised by his foreman that he would be laid off was was asked whether or not he wanted to take his vacation and vacation pay during the week in question and that each claimant elected to take his vacation and vacation pay during such week.
>
> "8. That the vast majority of the claimants had originally scheduled their vacation for a period of time subsequent to the week in question and a few may have originally been scheduled for a vacation during the week in question.

"9. That each claimant was paid vacation pay with respect to the week in question in an amount in excess of the weekly benefit amount.

"10. That approximately 60% of the claimants returned to work immediately after the week in question and the remaining 40% of the claimants were not scheduled to return to work until a later date."

The pertinent parts of Joint Exhibit A are as follows:

"Section 12. Joint Exhibit A.

"C. Scheduling of Vacation.

"Promptly after March 1 of each calendar year each eligible employee shall be requested to specify the vacation period he desires. Vacations will, so far as practicable, be granted at times most desired by employees (longer service employees being given preference as to choice); but the final right to allot vacation periods and to change such allotments is exclusively reserved to the Company in order to insure the orderly operation of plants; provided that vacations shall be scheduled, in the absence of mutual agreement between local plant management and local grievance committee to the contrary, between May 1 and October 1 of each calendar year or, with the consent of the employee, at such other time during the calendar year as may be agreeable to the plant Management and the employee.

"D. Vacation pay.

"Each employee granted a vacation will be paid at his average rate of earnings per hour for the first two of the last four closed and calculated pay periods worked by the employee preceding the first week of the actual vacation period. * * *

"E. Vacation allowance.

"The Union and the Company agree that their mutual objective is to afford maximum opportunity to the employees to obtain their vacations and to attain maximum production. All employees eligible for vacation shall be granted their vacation from work * * *."

The provisions of the Unemployment Compensation Law bearing on the question are:

Section 4141.29, Revised Code:

"Each eligible individual shall receive benefits as compensation for loss of remuneration due to total or involuntary partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46, inclusive, of the Revised Code * * * "

Section 4141.01, Revised Code, provides in part:

"(M) An individual is 'totally unemployed' in any week during which he performs no services and with respect to such week no remuneration is payable to him.

Section 4141.31:

"(B) Benefits payable for any week shall not be reduced by the amount of remuneration claimant receives with respect to such week in any of the following forms:

"(2) Vacation pay or allowance paid to an individual with respect to weeks of unemployment during which he is unemployed for reasons other than being on 'vacation'; * * *."

The Board of Review, finding that each of the claimants requested vacation during the week in question, applied Section 4141.01 (M) to find that remuneration was received and that therefore under Section 4141.29 no benefits were payable because there was no loss of remuneration. In effect if found it unnecessary to pass on the question of whether the unemployment was "for reasons other than being on vacation" under Section

The Common Pleas Court determined that the Board's failure to apply Section 4141.31 (B) was unlawful and that the decision was therefore unreasonable. Of the five assignments of error argued, Numbers 1, 3, 4 and 5 revolve around this legal conclusion and will be discussed together.

We agree with the trial judge that the question of whether the vacation pay was remuneration for the purposes of Section 4141.29 cannot be so summarily disposed of as the Board sought to do. Since Section 4141.31 (B) provided that benefits shall not be reduced by remuneration received for vacation pay under certain circumstances, it follows *a fortiori* that they cannot be eliminated by it, since elimination is merely reduction to point zero. Therefore, regardless of the statute's use of an inept word to express the thought, vacation pay is *not* remuneration within the meaning of Sections 4141.01 (M) and 4141.29, Revised Code, if the unemployment was "for reasons other than being on vacation".

It is therefore essential to determine what was the reason or cause, not for the receipt of the pay, but for the failure to work. If failure to work was caused by being on vacation then no benefits are payable; if it was caused by other reasons, whether lack of work to be performed or "layoff", then they are payable.

For the solution of this question we are thrown squarely on the meager and, in some respects, unsatisfactory language of paragraph 7 of the agreed statement:

"That *shortly prior* to the week in issue in each case, each claimant was advised by his foreman that *he would be laid off* and was asked whether or not be wanted to take his *vacation and vacation pay* during the week in question and that each claimant elected to take his vacation and vacation pay during such week".

We are not informed as to whether the "layoff" was merely a temporary and partial reduction in force or a plant shut down, or

whether the election offered involved opportunity for reflection and consultation with members of the employees' families or was required to be made immediately. The bland language of paragraph 10 is particularly uninformative on whether the 60% of the claimants were recalled to work by the foreman at the end of the week or returned as a matter of course, and whether the remaining 40% who were not scheduled to return were not scheduled because their vacations were not complete or because a lack of work still existed as to them.

All these questions are important in determining the ultimate fact of causation of unemployment, whether it was vacation on one hand or "no work available" or "layoff" on the other. Yet the Board, the trial judge and the members of this court are asked to do so without the answers to them.

Counsel for the employer stresses the fact that the immediate cause of unemployment must have been vacation, because a layoff cannot be in effect until the day it is scheduled to occur. This is, of course, likewise true as to vacations and does not answer the question. He argues further that the statement in paragraph 7 that the worker "would be laid off" was only an expressed intention to lay off in the future, but that the *subsequent* "election" of the worker to take vacation became a binding and irrevocable step which precluded the layoff when the time for it occured. This does not follow, for while the employer, in theory only, might of his own volition cancel the layoff before the time for it occurred, he could equally be recourse to Section 12C of the employment contract, unilaterally change the allotment of vacation period, subject only to the requirement that it was to insure orderly operation of the plant. While both the layoff decision and the vacation allotment were, in theory, tentative and revocable, in the course of operating a large and complex industrial plant either decision when made "shortly before the week in question" was, in fact, final and it is the priority of decision in point of time rather than revocability which should determine causal connection.

There is nothing in paragraph 7 of the statement to indicate that the layoff was conjectural, tentative or in the course of consideration. The foremen's message has suffered somewhat in its re-rendering of person, tense and mood to get into a stipulation. To the writer it does not say: "You *might be laid off* on July 3 unless you take your vacation then". It ways, on the contrary: *"There will be no work* for you from July 3 on in any event. Do you want to forego your later planned vacation so that, while we have no work for you, you can use up your vacation time and take your vacation pay?" This was the "election" made by the worker and this election could have absolutely no effect on whether there would be work at the plant for him to perform on July third. The real and effective cause of the claimant's lack of employment in each case was, therefore, that the employer had no work ready for him to perform, not that he had adjusted his vacation plans to conform to the employer's economic decision. In terms of proximate causation, that is the effective cause, he was idle for reasons "other than being on vacation" and the fact that he could elect to treat the employer-forced idleness as a reason for using up contracted for vacation time and receiving contracted for vacation pay cannot alter that essential fact.

This analysis is born out by the amazing lack of selectiveness of the various foremen in dealing with their men. If we are to consider paragraph 8 of the agreed statement they sought out men who had previously been alloted a vacation during the week in question to inform them, without qualification, that "they would be laid off". This is not indicative of negotiation for or of imposition of a general plant vacation; it is announcement of general layoff for lack of work to be performed. We conclude that assignments of error 1, 3, 4 and 5 are not well taken.

The second assignment of error is that "the Court of Common Pleas erred in saying that there was no dispute as to the evidence and then in vacating and reversing the decision of the Board of Review on the basis of inferences it chose to draw from the evidence and the Board's finding of fact".

In this connection appellant devotes much argument to questions of "weight of the evidence". There is no "weight of the evidence" in this case because there was no evidence as such; there was only an agreed statement of fact which is in the nature of a special finding of facts. Knowlson v. Bellman, 160 Ohio St. 359. As to the trial judge's incursion into the file for statements of the employer, as claimed in brief, this was a search for clarification of "facts" as agreed upon. In the view taken of the agreed statement of facts, this incursion was not necessary to the trial judge's decision. The error, if error there was, is therefore not prejudicial.

By way of commentary on the selections made by appellant from the various documents we find that the question of eligibility of the claimants to *supplemental* unemployment benefits has no bearing on their eligibility for the benefits in question, since one depends on construction of a private contract, the other on statute. Nor does the power of the employer to assign vacations without regard to the employees' wishes have any bearing on the question before us, since it is not claimed that this power was ever exercised.

Nor are we concerned with the social or moral desirability of a man receiving contracted for vacation pay covering the same period for which he draws unemployment compensation, so long as he can simultaneously qualify under the statute and his contract. If it

is socially undesirable, recourse can be had to the legislature to change the statute which has, in fact, already been done. But changes made in the statute since the period in question are not retroactive. Our duty is merely to apply the facts to the statute as it then stood, not to change the meaning of that statute to conform to an afterthought of a later legislature. We no not consider the cases of Reid v. Board of Review, Bureau of Unemployment Compensation of Ohio, 155 Ohio St. 6, Mohawk Rubber Co. v. Popeko, case number 4249 Court of Appeals of Summit County, or Dahman v. Commercial Shearing and Stamping Co., et al, 13 Ohio Opinions (2d) 368, or the multitude of other cases decided on the law as it existed prior to adoption of Section 4141.31 (B) in 1959 at all determinative or even helpful in disposing of the question here involved, since they were all decided without reference to the statutory language with which we are confronted.

We find no assignment of error well made and the decision of the Court of Common Pleas, Mahoning County, is affirmed.

Jones, J., Concurs in Judgment.
Brown, P.J., Dissents.

APPROVED:

JAMES G. FRANCE
JUDGE.

BROWN, P.J., DISSENTING.

It is undisputed in the stipulation or elsewhere in the record that the appellees-claimants for unemployment compensation, subsequent to being advised that a lay-off was impending, voluntarily elected to take vacation and vacation pay.

Nowhere in the law is there authority to pay unemployment benefits to an individual who is on vacation.

A person who is on vacation and receiving vacation pay is not an eligible individual under Revised Code Section 4141.01 (M).

Revised Code Section 4141.31 (B) (2) does not apply. That section has to do with what benefits payable shall not be reduced by, and there are no benefits payable under the statute in this case. This was the finding of the Board of Review and is entirely correct unless the voluntary agreement to go on vacation becomes unlawful under Revised Code Section 4141.32 when the employer suggests that a layoff is imminent.

In order to arrive at this conclusion we would have to read into Revised Code Section 4141.32 a legislative intent, which we are not justified in doing in view of the clarity and lack of ambiguity of that section.

The trial court erred in finding that Revised Code Section 4141.31 (B) (2) applied to these facts.

The judgment of the Court of Common Pleas should be reversed.

APPROVED:
PAUL W. BROWN
JUDGE.

MOTION FILED

DEC 30 1976

No. 75-1707

Supreme Court of the United States

October Term, 1975

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,

Appellants,

v.

LEONARD PAUL HODORY,

Appellee.

On Appeal from the United States District Court from the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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Supreme Court of the United States

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No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
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v.

LEONARD PAUL HODORY,

Appellee.

On Appeal from the United States District Court from the Northern District of Ohio, Eastern Division

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file the attached brief *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. Counsel for appellants have consented to the filing of that brief, but counsel for appellees have refused such consent. This motion and the attached brief are filed within 30 days of the filing of the Brief of Appellants in this Court.

INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 109 national and international unions having a total membership of approximately 14,000,000 men and women. This case involves an

important question involving the unemployment compensation system, which was designed to protect "industrial workers ordinarily employed." (Committee on Economic Security, *Report to the President,* 13 (1935). That, of course, is an accurate description of the great majority of trade union members. Consequently, the AFL-CIO has participated, both as a party and as *amicus curiae* in several cases concerning the unemployment insurance system, including *California Department of Human Resources,* v. *Java,* 402 U.S. 121; *Indiana Employment Security Div.* v. *Burney,* 409 U.S. 540; *Fusari* v. *Steinberg,* 419 U.S. 379; and *Crow* v. *California Dept. of Human Resources Development,* 420 U.S. 917.

THE ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The issue decided by the three-judge court was whether the denial of unemployment compensation benefits to a class of approximately 1250 steelworkers assertedly because their unemployment was due to a strike by coal miners at mines owned by their employer denied those steelworkers equal protection of the laws. On the understanding that this issue will be explored in depth by the parties, we do not address it directly in our brief.

However, appellants and certain *amici curiae* appearing on their behalf raise another contention in this Court—that the federal labor policy favoring the free use of economic weapons precludes states from paying unemployment compensation benefits to persons involved in labor disputes generally, and to persons in the situation of the *Hodory* class in particular. In Part II of our brief, we demonstrate that this contention is both erroneous and, at

any rate, not pertinent to the resolution of this case.

Before reaching that issue, in Part I of our brief we explain that perusal of the briefs and record in this case raises the constitutional question whether the court below should have reached the constitutional issue at all or should, instead, have retained jurisdiction to await determination of unsettled questions of state law by the state courts. The *Hodory* class has appeals pending before the state Board of Review, contending that the denial of benefits to them was improper under state law. These appeals have been stayed pending the outcome of this case. The abstention question was raised before the district court and addressed in its opinion; although alluded to by appellants in this Court, it has not been directly raised here.

We demonstrate in Part I that the district court's assumption that no uncertain question of state law is involved in the state appeals may well be incorrect; indeed, it appears that an even larger class of steel workers laid off by the same steel companies assertedly because of the same mine strike *were* granted benefits, and that Ohio law is unclear in several pertinent respects. We therefore suggest, after reviewing cases of this Court concerning the abstention doctrine, that the propriety of the district court's decision to proceed with constitutional adjudication should be reviewed by this Court.

CONCLUSION

Because the attached brief covers two issues which we believe will not be adequately covered by the parties, this motion for leave to file a brief as *amicus curiae* should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1975

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LEONARD PAUL HODORY,

Appellee.

On Appeal from the United States District Court from the Northern District of Ohio, Eastern Division

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent on the granting of the foregoing motion for leave to file a brief as *amicus curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

This constitutional case comes to this Court in an odd posture. Appellees have a substantial state statutory claim which is pending before the agency established by the state to administer that statute and which that agency has not resolved, awaiting disposition of the equal protection clause question posed here. Mindful of the principle that consti-

tutional claims should be decided only when necessary, we therefore begin by describing the context in which this controversy arises; discussing the state statutory issue inherent in that context; and, after reviewing the Ohio law and the basis for our view that the state statutory claim is substantial, point out the possible application of the abstention doctrine to this case.

In Part II of our brief we address the contention in appellants' brief that federal labor policy requires the states to deny unemployment compensation to employees laid off by a company because other employees of that company are on strike. We demonstrate therein that this Court in *Kimbell, Inc.* v. *Employment Security Commission,* ..... U.S. ....., 45 U.S.L.W. 3247 (Oct. 4, 1976), rejected the general proposition that federal law precludes state determination to pay unemployment compensation to persons on strike; that the initial administrators of the Social Security Act expressly approved as consistent with federal law state payment of benefits to persons unemployed due to a labor dispute but not themselves on strike; and that this supremacy clause argument is, in any event, beside the point here since the decision below rests on the equal protection clause and a federal law like a state law is subject to invalidation if it lacks a rational basis.

ARGUMENT

I

1. At the pertinent time, § 4149.29(D)(1)(a), Ohio Rev. Code provided, so far as is relevant here, that an unemployment compensation claimant is disqualified:

> "For any week with respect to which the administrator finds that * * * his unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute."[1]

Mr. Hodory and approximately 1250 other employees at certain plants of Republic Steel and United States Steel in Ohio were denied benefits by appellant Ohio Bureau of Employment Services because their unemployment was allegedly "due" to a labor dispute at coal mines owned by the steel companies. Appeals were taken on behalf of all these employees to the administrative Board of Review. (App. 50.) The Board of Review, since the filing of Mr. Hodory's complaint in this case, has determined not to rule upon these appeals until this lawsuit is finally resolved.[2] (Jurisdictional Statement, at 6; Brief for Appellants, at 4.)

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[1] This subsection was amended, effective Dec. 2, 1975, to provide that:

> "No individual shall be disqualified under this provision if: (i) his employment was with such employer at any factory, establishment, or premises located in this state, owned or operated by such employer, other than the factory, establishment, or premises at which the labor dispute exists, if it is shown that he is not financing, participating in, or directly interested in such labor dispute." (App. 51.)

This amendment has, to our knowledge, not yet been construed by Ohio courts. It does appear from the language, however, that claimants in the position of the *Hodory* class but laid-off after the effective date of the amendment are eligible for benefits.

[2] The reason why the Board of Review has decided to await the final resolution of this case before deciding whether benefits are due either the *Hodory* class or the other steelworkers assertedly affected by the mine strike (see p. 4, *infra*) is not stated. While the airing and resolution of the state law questions could affect the merits of the constitutional adjudication (see pp. 13-15, *infra*) the only re-

Mr. Hodory initially sought to represent an expansive class of persons assertedly similarly situated—all those whose claims for unemployment benefits have been or will be denied because of the operative effect of § 4141.29(D)-(1)(a). The three-judge court, however, declined to certify this broad class. (App. 55.) Instead, it recognized Mr. Hodory as properly representing under Rule 23 of the Federal Rules of Civil Procedure only the "approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, [and] were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in § 4141.29(D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits," (App. 55) and the relief granted was limited to this class (App. 60, 61).

It appears that there was another large group of steelworkers laid off at the same time by the same steel companies assertedly for the same reason—the nationwide mineworkers' strike—who *were* granted benefits by appellant Bureau. (Br. for Appellants, at 3.) According to appellants, "[t]he steel companies are appealing these decisions in the

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verse effect of the constitutional issues upon the state administrative proceedings we can perceive is that if the order below is upheld it may be unnecessary for the Board to decide certain state law issues. (Since the order only requires paying of benefit to those denied "solely on the basis of § 4141.29(D)(1)(a)" (App. 61), some unrelated state law questions may remain with regard to some class members.) The substance of the state law issues appears entirely unaffected by this case, and, therefore, if the Board or the state courts were to decide that the discharges were not "due" to a labor dispute within the meaning of state law, benefits would be paid under state law regardless of the outcome of this case.

state courts." (*Id.*)[3] The reason benefits were granted to this group was, again according to appellants, that "the company owned coal mines did not supply a sufficient amount of fuel to effect a plant shut down." (*Id.*) Appellants do not discuss what degree of dependence was "not • • • sufficient" to render the lay-offs "due" to a labor dispute, nor do the parties or the district court explain how the situation of the *Hodory* class differed from that of the other steel workers who were granted benefits.[4]

This set of circumstances in itself appears to us at least to raise the question whether the three-judge court ought to have reached the constitutional issue it decided. For Ohio

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[3] As an *amicus curiae* the AFL-CIO is of course not familiar with this set of events except as they appear in the record and briefs in this case. The purpose of this summary and of the legal analysis which follows is, therefore, merely to point out circumstances which might merit further inquiry by the Court from the parties in order to determine whether the constitutional issue ought to be reached in this case. Counsel for appellants has informed us, however, that in fact the steel companies' appeal is still at the Board of Review stage and has been stayed pending this Court's *Hodory* decision; *other* cases arising from similar but separate situations and involving related issues of state law are, again according to counsel for appellants, now pending in state court after completion of administrative appeals but have also been stayed awaiting the outcome of this case.

[4] Moreover, appellants do not tell us whether the question of dependency upon company-owned coal was determined on a plant-by-plant basis, rather than inquiring into the degree to which all the Ohio plants of each employer depended on such coal, and if so, why. Appellants note (Br. for Appellants, at 35) that while the *Hodory* class numbers about 1,250 claimants, company records show that 2,696 claimants were laid off by the company. It therefore appears that approximately 1,446 employees of the company have been held eligible for benefits although laid-off during the coal strike.

law seems to be entirely unclear as to what constitutes unemployment "due" to a labor dispute—that is, what degree of dependence upon the product of a struck facility is necessary before an employer may successfully show that lay-offs at one of his plants was "due" to the strike at another.

2. Insofar as the court below recognized at all the existence of a state statutory claim, it simply assumed that "Section 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits" (App. 52) and that therefore "Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law" (App. 54). That assumption is belied by the seemingly contradictory results in the proceedings just described. Indeed, our review of the state cases leads us to the conclusion that those cases are not at all inconsistent with the *Hodory* class' ultimate success upon the claims pending before the state Board of Review.

To be sure, it is true, as the court below noted, that it *is* entirely clear under Ohio law that claimants may be disqualified under the labor dispute exception although they are "involuntarily" unemployed in the sense that they are not participating in the dispute. (App. 53, citing *Cornell* v. *Bailey*, 163 Ohio St. 50, 125 N.E.2d 323 (1955).) But the circumstances in which a lay-off is considered to be "due" to the labor dispute are much less lucid.

State cases construing the labor dispute disqualification *have* made clear that the mere concurrence of lay-offs and a labor dispute is insufficient to show that the lay-offs were due to the dispute. "[I]n order to disqualify claimants it must be determined that there was a direct causal relationship between the • • • dispute and claimant's loss of em-

ployment." (*Cornell* v. *Bailey, supra.* See also *McGee* v. *Timken Roller Bearing Co.*, 161 N.E.2d 905 (Ohio Ct. of App. 1956); *Baumgarte* v. *Bd. of Rev.*, 186 N.E.2d 146 (Ohio Ct. of Common Pleas, 1961; cf. *Leach* v. *Republic Steel Corp.*, 176 Ohio St. 240, 199 N.E.2d 3 (Ohio Supr. Ct. 1964).) Those reported cases in which dispute occurred at a location separate from that which claimants were employed and such causation was found appear to stress at least two factors: (1) the products of the plant which was struck were non-fungible goods essential to the activities at the location where claimants were employed; (2) the claimants' plant was entirely dependent upon those products, and no management reallocation of resources could change that situation. For example, in *McGee, supra,* the court noted that the Toledo plant, where claimants worked, did not fabricate from raw materials but, rather, inspected and assembled insulators produced by the struck plant at Hamtramck; it also mentioned that there were patents involved, so that presumably the insulators could not be purchased elsewhere; and it discussed the question whether insulators produced by other plants of the employer could have been used, and concluded that it "would not be possible for the Toledo plant to continue functioning • • • if the Hamtramck plant were out of existence." (*Id.*, at 912.) The Ohio court held, therefore, that "[t]he inescapable conclusion • • • is that claimant's temporary unemployment at the Toledo, Ohio plant was caused directly and proximately by a labor dispute." (*Id.*)

While the basic requirement of direct and proximate causation is thus clear, the Ohio courts have not elucidated the principles governing situations in which such causation will be found not to exist. In particular, this case

seems to vary from *McGee, supra* in at least three ways which may, or may not, be relevant under state law:

1. The coal strike was nationwide rather than limited to the employers' mines and this could have been the reason why alternative supplies were not available or sought. Thus, it may be that while the lay-offs were "due" to *a* labor dispute, they could be held to be not "due" to the dispute *at the employers' mines,* as the statute requires. (Cf. *Baumgarte, supra.*)

2. The claimants' plants may not have ordinarily received *all* of their coal supplies from the struck locations.[5]

3. The struck product here was a fungible commodity which the employer perhaps *could* have purchased elsewhere and thereby have continued to operate.[6]

Thus, it would be consistent with the prior cases and the rationale of the labor dispute disqualification for the state courts to hold that, for any one of these three reasons, the lay-offs were not "due" to the labor dispute at the companies' mines within the meaning of the state statute.

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[5] As noted, p. 5, *supra,* the degree of dependence upon the employers' own coal does not appear. However, as also noted, p. 4-5, *supra,* other employees of the same companies laid off at the same time were held eligible, because the companies were not sufficiently dependent on their own coal mines for coal supplies. We have been informed by counsel for appellants that the Department devised an arbitrary percentage test for determining the disqualifying degree of reliance, although counsel did not know exactly what percentage was considered disqualifying or whether that same test was applied to the *Hodory* class.

[6] Other steel companies did continue to operate during the coal strike by importing coal. (See *American Metal Market,* Vol. 81, No. 242 (Dec. 13, 1974), at 3.)

3. What we have said thus far implicates the doctrine that the federal courts in certain circumstances ought not decide constitutional questions until uncertain questions of state law have been resolved by the state courts. Indeed, although appellants do not in this Court contend that the three-judge court should have abstained from reaching the constitutional question in order to await clarification of state law, the question was raised before the court below and addressed in its opinion. (Br. for Appellants, at 5; App. 54.)[7] The court below noted, correctly, that " 'absten-

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[7] We do not know why appellants have not raised the abstention question in this Court. However, it does appear that they may be in a peculiar situation which makes it difficult for them to do so. For appellants themselves, of course, have decided that, as far as they are concerned, state law does disqualify the *Hodory* class. To present a proper abstention argument would require demonstrating that this in fact may not be true—that state law may in fact be construed on administrative appeal or by state courts not to disqualify that class, because their unemployment was not "due" to a labor dispute within the meaning of § 4141.29(D)(1)-(a). The abstention argument appears to have been presented to the court below without analysis of the unsettled state of Ohio law in this regard but, instead, on the assumptions that the only issues were either factual or premised on the federal constitution. (*See* App. 52-54). However, "the fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue," (*Bellotti* v. *Baird,* ..... U.S. ....., 44 U.S.L.W. 5221, 5224 n. 10), and the fact that abstention is not specifically relied upon here is immaterial, since "abstention may be raised by the court *sua sponte.* See *Railroad Comm'n* v. *Pullman Co.* [312 U.S. 496], Cf. *England* v. *Board of Medical Examiners,* 375 U.S. 411, 413." (*Id.*)

Both appellants and the three-judge court linked the abstention question to the fact that administrative appeals were (and are) pending (Br. for Appellants, at 5; App. 51, 54). In fact, the abstention doctrine does not depend upon the existence of concurrent state proceedings, administrative or judicial (see, e.g.,

tion should not be applied merely to await an attempt to vindicate a claim of the appellant in state court.' " (App. 54, quoting *Gay* v. *Board of Registration Commission,* 466 F.2d 879, 885 (6th Cir. 1972). See e.g. *Wisconsin* v. *Constantineau,* 400 U.S. 433; *Zwickler* v. *Koota,* 389 U.S. 241, 250-252.) But

> "[w]here resolution of the federal constitutional question *is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law,* abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication * * *. The doctrine * * * contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius,* 380 US 528, 534, 14 L Ed 2d 50, 55, 85 S Ct 117 (1965)." (*Lake Carriers' Assoc.* v. *McMullen,* 406 U.S. 498, 511 (emphasis supplied).)

Thus, while abstention is appropriate "only in 'special circumstances,' see *Zwickler* v. *Koota,* 389 U.S. 241, 248, and only upon careful consideration of the facts of each case [,] *Baggett* v. *Bullitt,* 377 U.S. 360, 375-379; *Railroad Comm'n* v. *Pullman Co.* [312 U.S. 496, 500]," (*Harris County Comm'rs Court* v. *Moore,* 420 U.S. 77, 83),[8] "the

Lake Carriers' Assoc v. *McMullen, supra,* at 512-513; *Harris County Comm'rs Court* v. *Moore,* 420 U.S. 77, 81 n.3, 88-89), and, conversely, as the district court correctly recognized, the pendency or availability of state administrative remedies does not itself defeat federal court jurisdiction under 42 U.S.C. § 1983 (*Damico* v. *California,* 389 U.S. 416. Cf. *Gibson* v. *Berryhill,* 411 U.S. 564, 574; *Burrell* v. *McCray,* ..... U.S. ....., 44 U.S.L.W. 4860 (dismissing cert. as improvidently granted)).

[8] For example, abstention often involves delay and expense (see

paradigm case for abstention arises when the challenged state statute is susceptible of a 'construction by the state courts that would avoid or modify the [federal] constitutional question. *Harrison* v. *NAACP,* 360 U.S. 167 * * *." (*Lake Carriers', supra,* at 510-511, quoting *Zwickler* v. *Koota,* supra, at 249.)

The three-judge district court recognized the basic parameters of the abstention doctrine,[9] but appears to have

England v. *Board of Medical Examiners, supra; Reetz* v. *Bozanich,* 397 U.S. 82, 86), and avoidance of protracted delay and expense is a valid consideration in determining whether or not a federal court should abstain. (*Public Utilities Commission* v. *United Fuel Gas Co.,* 317 U.S. 456, 463; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 329; *Harris County Comm'rs Court* v. *Moore, supra,* at 84). Here, however, it may well be that the *failure* to abstain has contributed to the fact that the *Hodory* class has not yet received benefits for a period of unemployment which occurred two years ago. For, as a consequence, both questions of state law and simple factual issues have not been settled in the administrative process. In particular, while not relevant to the abstention question because no unsettled state law is involved, it seems quite possible that the *Hodory* class could prevail on appeal simply because the steel lay-offs appear to have been exactly concurrent with the beginning of the mine strike and therefore may not have been caused by a lack of coal due to the strike. (See jurisdictional statement, at 45-46 (showing that Hodory filed a claim for the week ending 11/16/74) and BNA, Labor Relations Yearbook, 1974, p. 5 ("Chronology of Major Events" stating that coal strike began at midnight November 11, 1974).) Ohio law clearly provides that a lay-off is not "due" to a labor dispute at another facility of an employer if work could have proceeded substantially as usual despite the strike. (*McGee* v. *Timken Roller Bearing Co., supra; Baumgarte* v. *Board of Review, supra.* It appears extremely unlikely that the steel plants had no coal stockpile whatever.

[9] The district court ruled not only upon abstention but upon the related but separate contentions that the doctrine requiring exhaustion of administrative remedies or the prohibition against

evidenced a slight misunderstanding. For the court seemed to regard abstention as appropriate only if the state statute "could be rendered constitutionally inoffensive by a limiting construction in the state courts." (App. 54.) In fact, while it is necessary to trigger abstention that the state law be uncertain, it is not necessary that a construction be available which would obviate any conceivable constitutional objections. Rather, since one purpose of abstention is to avoid "premature constitutional adjudication" (*Lake Carriers', supra,* at 511), it may be sufficient that no constitutional questions will arise after interpretation with regard to the particular parties, because the statute will be determined not to apply to their detriment. For example, the seminal abstention case, *Railroad Comm'n* v. *Pullman,* 312 U.S. 496, turned upon the fact that

> "[c]onstitutional adjudication plainly can be avoided if a definitive ruling on the *state* issue would terminate the controversy. • • • If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise." (*Id.,* at 501.)

Thus, abstention may be appropriate "in cases presenting a federal constitutional issue which might be mooted • • • by a state court determination of pertinent state law." *County of Allegheny* v. *Frank Mashuda Co.,* 360 U.S. 185, 189.

Further, abstention may also be proper where resolution of the state law question, whether in favor of or against the

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federal court injunctions of certain state judicial proceedings (see *Younger* v. *Harris,* 401 U.S. 37; *Huffman* v. *Pursue,* 420 U.S. 592) required dismissal of this case. The rulings upon the latter two questions are quite correct, for the reasons given by that court. (App. 52-54.) See n. 7, *supra.*

party invoking federal court jurisdiction, will not enable the federal court to avoid the federal question but will "significantly modify the federal questions" raised (*Lake Carriers', supra,* at 512), by "materially [changing] the nature of the problem." (*Harrison* v. *NAACP,* 360 U.S. 167, 177. See, e.g., *Harris County, supra,* at 87-88 & n. 11.) In a case such as this, which arises under the equal protection clause of the Fourteenth Amendment and in which the basic question is therefore whether the statutory standards "were reasonable ones with 'some basis in practical experience'" (*City of Charlotte* v. *Firefighters,* ..... U.S. ....., 44 U.S.L.W. 4801, 4803), it may be important to understand precisely the circumstances in which the labor dispute disqualification applies. The pertinence of the reasons offered to justify the exclusion may thus be illuminated, and the rationality of the exclusion, if it persists after state court interpretation, may therefore be affected by a clear understanding of where the exclusionary line is drawn.

Applying the foregoing principles, it is clear, first, that if any of the open state statutory questions are resolved in favor of the *Hodory* class, "there is an end of the litigation; the constitutional issue does not arise." (*Railroad Comm'n* v. *Pullman, supra.*) Second, exploration of these issues in state court could in any event "materially change the nature of the [constitutional] problem." (*Harrison* v. *NAACP, supra.*)

In particular, the resolution of these questions under state law could throw light upon the pertinence of the justifications offered by the state for the disqualification attacked by appellees. The state relies heavily in justifying the

exclusions upon two interests: (1) "assuring an adequate money reserve in its unemployment fund since its resources are limited by the tax vote on employers" (Br. for Appellants, at 11); and (2) "the policy of the State of Ohio to remain neutral in labor disputes" (*Id.*, at 23). As to the former, while this Court has held that fiscal considerations are not irrelevant in evaluating the rationality of an exclusion in a social welfare program (see, e.g., *Dandridge* v. *Williams*, 397 U.S. 471), the exclusion may not be entirely arbitrary; it must still have "some 'reasonable basis' ". (*Id.*, at 485.) If the state courts were to hold that lay-offs are "due" to a labor dispute although the employer could continue to operate by purchasing supplies elsewhere, it would appear that no distinction whatever, rational or otherwise, between the labor dispute disqualification and an ordinary employment decision to cease production for some period of time would remain, although employees laid off in the latter situation are eligible for benefits. Similarly, if the statute were interpreted to disqualify individuals working in plants which usually received, for example, more than 50% of their coal from company-owned mines but not plants of the employer which received less than 50% of their coal from such mines, it might be viewed as arbitrary for that reason alone, particularly since the company could presumably reallocate the coal from its mines if it wished to. Finally, disqualification by use of the percentage test in the context of a strike in *all* coal mines, such that no domestic coal would have been available whether or not the companies owned their own mines and the lay-offs would have therefore occurred in any event, seems entirely irrational.

Elucidation of the statute by the state courts could also

affect the weight given in constitutional adjudication to the "neutrality" justification.[10] For if the statute were held to disqualify claimants not involved in the strike and laid-off although the employers could have continued to operate, it would appear to insulate employers only from the increased cost, if any, of so operating, an economic cost of a strike unrelated to any governmental intervention. Thus, the state would not be neutral in the dispute; instead, it would be in effect subsidizing the *employer* by permitting him, in this one situation in which he decides to close down operations at his option, to do so without incurring the increase in unemployment taxes ordinarily the consequence of massive lay-offs due to management decisions or economic conditions. Further, if the state courts were to regard the lay-offs as "due" to a labor dispute at an establishment of the employer although, because of the nationwide nature of the strike, no domestic coal would have been available in any event, the state, far from being neutral, would be favoring a manufacturer who owns a coal mine over one who does not, even though they occupy the same economic position.

II

If the Court determines, after exploring the relevant factual and legal considerations, that abstention is not appropriate, it will be faced not only with the equal protection question decided below but with the contention of appellant and certain *amici curiae*[11] that the decision below must be

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[10] For reasons stated in Part II, *infra*, we do not regard the neutrality justification as a pertinent factor in this case if the Court proceeds to determine the constitutional questions at this juncture.

[11] See Brief for Appellants, at 23-24; Brief for the Chamber of Commerce of the United States as *Amicus Curiae*, at 4-20. See also Brief for Republic Steel Corporation as *Amicus Curiae*, at 17.

reversed because of the federal labor policy favoring free use of economic weapons in a labor dispute. This contention fails for three reasons. First, this Court, in *Kimbell, Inc.* v. *Employment Security Commission* ..... U.S. ....., 45 U.S.L.W. 3247 (Oct. 4, 1976), recently rejected the general proposition that payment of unemployment benefits to persons unemployed because of a labor dispute is forbidden as contrary to the Supremacy Clause. Second, the payment of benefits to persons unemployed due to a labor dispute but not themselves on strike was *explicitly* declared by the Social Security Board shortly after the Act was passed to be not only permissible but preferable, and almost all states do pay persons in the situation of Mr. Hodory. Thus, even if paying unemployment benefits to strikers *were* pre-empted, payment to persons uninvolved in the dispute but out of work as a consequence thereof would *not* be. Third, *even* if the pre-emption contention here were valid, that could not possibly determine the constitutional issue before the Court in this case. For a federal policy requiring the states to legislate in a certain manner is fully capable itself of violating the equal protection guarantee.[12] Thus, if the Ohio statute here attacked is irrational and therefore unconstitutional, the fact that it is irrational because federal policy so requires would not make the state statute valid; it would rather render the federal policy itself unconstitutional inso-

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But see Brief for United States Steel Corporation as *Amicus Curiae*, at 11, recognizing, correctly in our view, that there is "no federal pre-emption on the question whether benefits must be paid or denied to otherwise eligible and qualified claimants who lose or leave their work because of a labor dispute."

[12] The equal protection guarantee, of course, applies as against federal as well as state action. (See, e.g., *Mathews* v. *DeCastro*, ... U.S. ....., 45 U.S.L.W. 4049, 4049 n.1.)

far as it requires irrational legislation by the states.

1. The question whether federal labor policy precludes states from ever paying unemployment benefits to persons involved in labor disputes was before this Court less than three months ago in *Kimbell, supra*. New Mexico provides such benefits to strikers if their employer continues to operate despite the strike. Appellants in *Kimbell* contended that federal labor policy requiring state neutrality in the collective bargaining process forbid these payments.

Before acting upon *Kimbell*, this Court invited the United States to submit its views upon the question presented.[13] (44 U.S.L.W. 3685.) Noting that the pre-emption question turns initially upon Congress' intent when it enacted the National Labor Relations Act (29 U.S.C. § 151 *et seq.*), and the Social Security Act as here pertinent (26 U.S.C. § 3301 *et seq.*)[14], the Solicitor General, in a brief joined by the General Counsel of the National Labor Relations Board, took the position that the history of these acts showed conclusively that Congress left to the states whether and to what degree direct involvement in a labor dispute ought to disqualify a claimant from unemployment compensation benefits. This view, the Solicitor General pointed out, was reinforced by later legislative developments under the So-

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[13] The question presented in *Kimbell* was: "Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process." (Jurisdictional Statement, in *Kimbell, supra*, at 4.)

[14] The original National Labor Relations Act and the basic legislation creating a national unemployment insurance program (Titles III and IX of the Social Security Act of 1935) moved

cial Security Act, the NLRA,[15] the Railroad Unemployment Insurance Act, and in the statutes dealing with food stamps and various welfare programs. (Memorandum for the United States as Amicus Curiae in *Kimbell, supra,* at 5-8.) On this basis, the Solicitor General concluded that Congress had determined to permit diversity among the states with regard to disqualification of individuals directly involved in labor disputes to continue.[16]

through Congress at the same time. The Wagner Act was enacted into law on July 5, 1935, and the Social Security Act became law on August 14, 1935. Senator Wagner was a sponsor of both pieces of legislation.

[15] One of the key later developments was an attempt to amend the National Labor Relations Act in 1947 to strip unemployment compensation recipients of their "employee" status under the Act. This history is reviewed in the Solicitor General's Memorandum in *Kimbell* (at 6-7). The decision to reject a provision enacted by one house of Congress which would have had substantially the preemptive effect relied upon by appellants must be taken to constitute a rejection of the premise of that provision—that there is a fundamental inconsistency between the NLRA and the payment of unemployment insurance to persons out of work due to a labor dispute—since "it is clear that those interested in just such a [result] were unable to secure its embodiment in enacted law." *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 290.

[16] The suggestion that, because persons on strike are "employees" under the NLRA, they cannot be considered unemployed for purposes of state unemployment statutes (Br. for Chamber of Commerce as *Amicus Curiae,* at 15, n. 9) is entirely misconceived. The precise decision made by Congress in 1947 (see n. 15, *supra*) was to reject a provision in the House bill which would have eliminated from the definition of "employee" in the NLRA those strikers who are receiving unemployment compensation benefits. Thus, Congress not only determined that the payment of such benefits is not inconsistent with the national labor policy, but that the definitions of "employee" in the NLRA and the state unemployment compensation laws need not coincide. Moreover, *nonstrikers,* like appelles,

We recognize, of course, that summary affirmances and dismissals for want of a substantial federal question[17], while binding upon lower courts (*Hicks* v. *Miranda,* 422 U.S. 332, 344-345), are not necessarily accorded the same weight in this Court as decisions rendered with full opinion after oral argument. (*Edelman* v. *Jordan,* 415 U.S. 651, 671.) In this instance, however, there was only one question presented,

who are laid off are considered "employees" for purposes of the NLRA if "they [have] a reasonable expectancy of further employment in the foreseeable future." (*Scobell Chemical Co.* v. *NLRB,* 267 F.2d 922 (2nd Cir.).) Under this test, ordinary laid-off employees are regularly held to be "employees" within the definition of the NLRA. (*Scobell, supra; American Export Lines,* 81 NLRB 1499; *Sullivan Surplus Sales, Inc.,* 152 NLRB 132; *D&H Farms,* 192 NLRB 53.) Yet, such persons can clearly be unemployed within the meaning of the unemployment compensation law of every state, including Ohio (see § 4141.29(A)(4)(a), Ohio Rev. Stat.), if they are not in fact working. Indeed, since "[t]he purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers to 'tide themselves over, *until they get back to their old work* or find other employment * * *'" (*California Department of Human Resources* v. *Java,* 402 U.S. 121, 131, quoting H. R. Rep. No. 615, 74th Congress, 1st Sess., 7 (1935) (emphasis supplied)), they are at the core of those whom the unemployment compensation system was intended to protect.

[17] The suggestion of the Chamber of Commerce (Br. of the Chamber of Commerce of the United States as *Amicus Curiae,* at 18 n. 11) that this Court did not decide the federal question presented in *Kimbell* on the merits is obviously incorrect. None of the parties or *amici curiae* appearing in *Kimbell* (including the Chamber of Commerce, which so appeared) ever suggested that the federal question had not been properly presented in the state court system, or that the question was not before this Court on the merits. And "dismissal for want of a substantial federal question" is the expression consistently used by this Court to denote a summary decision on the merits of an appeal from a state court. (See *Hicks, supra,* 422 U.S. at 344; R. Stern & E. Gressman, Supreme Court Practice 197 (4th ed. 1969); C. Wright, Law of Federal

and the Court acted after unusual airing of that question.[18] At any rate, even viewed *de novo,* the legislative history explored by the Solicitor General compels the conclusion that Congress intended to permit, but not require, states to pay unemployment compensation benefits to persons directly involved in labor disputes.

2. The denial of unemployment benefits to strikers is not, of course, challenged in this case; and the rationale of the lower court decision would clearly permit such exclusion as consistent with the equal protection clause. Rather, the question here is whether states may deny benefits to workers who are *not* on strike, do not work at the location of the strike, are not members of the union on strike and will not benefit from the strike. Even without regard to the preemption question, it is an odd concept of state neutrality in a labor dispute to deny benefits to persons who cannot influence the outcome of the dispute, in order to decrease the economic burden on employers which ordinarily results

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Courts 495 (2d ed. 1970). Cf. *Colorado Springs Amusements, Ltd.,* 44 U.S.L.W. 3758, 3759 n. 1, 3760 (Brennan, J., dissenting).) The rubric used to denote dismissal where the federal question was not timely or properly raised in state court is dismissal "for want of a properly presented federal question." See, e.g., *National Gypsum Co.* v. *Louisiana Dept. of Employment Security,* 313 F.2d 527 (La. Sup Ct.), *appeal dismissed for want of a properly presented federal question,* 423 U.S. 1009, in which there was an attempt to raise basically the *same* question decided in *Kimbell,* but the supremacy clause challenge had been untimely in the state courts.

[18] In addition to the usual Jurisdictional Statement and Motion to Dismiss, there were filed in *Kimbell,* before decision, the Solicitor General's memorandum noted earlier, a brief *amicus curiae* of the Chamber of Commerce (similar to its submission in this case), and an appellants' Supplemental Brief in Response to the Memorandum for the United States as *Amicus Curiae.*

from lay-offs.

It is, however, preeminently clear with regard to this exclusion that the Social Security Act affirmatively permits states to pay benefits to persons in the position of the *Hodory* class. For in January 1936, six months after both the Social Security and National Labor Relations Acts were passed, the Social Security Board issued two draft state unemployment compensation bills, which were stated by the Board to "[meet] the • • • standards required under the federal social security act for state unemployment compensation laws." (Social Security Board, *Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types* (1936) (cover page).) The Board noted further: "This draft is merely suggestive • • •. Therefore, it cannot properly be termed a 'model' bill or even a recommended bill. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted." (*Id.*) Thus, while provisions included in the draft bills were determined to be consistent with federal law, they were *not* determined to be required by federal law. For this reason, neither the fact that *a* labor dispute disqualification was included, nor the precise formulation adopted, portends a determination that such is required, but the language of the draft bills does demonstrate that the Board regarded such provisions as permissible and, therefore, not preempted.

The draft bills both provided, with respect to the labor dispute disqualification, that claimants are disqualified:

"For any week in which it is found by the commission

that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that:

"1. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

"2. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;

"and provided further that if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall for the purposes of this subsection be deemed to be a separate factory, establishment or other premises." (*Id.*, at § 5(d).)[19]

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[19] Before the Act was passed, the Committee on Economic Security prepared draft unemployment bills. Hearings on 5.1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., "Economic Security Act," February 9, 1935, pp. 591-632. These bills varied somewhat from the ones later distributed by the Social Security Board. In particular, the labor dispute provision provided simply that:

"An employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed." (*Id.*, at 601, 621).

It seems apparent that the latter formulation is not inconsistent with the earlier draft but, instead, specifies with greater precision

Under this provision it is clear that the *Hodory* class would be eligible for benefits. At least 43 jurisdictions have adopted, pursuant to this suggestion, exceptions to labor dispute provisions which render eligible persons not participating in nor interested in the dispute. (App. 66-67.)

Thus, the body then charged with administering the Social Security Act[20] determined, almost immediately after the Act was passed, that payment to persons not directly involved in a labor dispute but unemployed as a result was consistent with Congressional intent. "True it • • • is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons • • •. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (*Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315.)

3. While the foregoing demonstrates that with regard to labor dispute disqualifications generally, and with regard to disqualification of persons not themselves involved in the dispute in particular, Congress intended to permit states to exercise their own discretion, the whole pre-emption

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the meaning of "directly due to a labor dispute • • • in the establishment in which he is or was last employed."

[20] The function of administering the unemployment compensation system, originally allocated to the Social Security Board, was transferred to the Federal Security Administrator by 1946 Reorganization Plan No. 2. The functions of the Administrator with respect to unemployment compensation were later transferred to the Secretary of Labor, by 1949 Reorganization Plan No. 2, § 1. (See 42 U.S.C.A. § 503, Historical Note.)

question appears to us to have been infused into this case without any relevance at all, in an attempt to induce this Court to reconsider its decision a few months ago in *Kimbell*. For the statute here in question may not violate the equal protection clause although not pre-empted; and it may violate that clause even if it is required by federal labor policy.

Indeed, the attempts of appellant to demonstrate that the exclusion of the *Hodory* class from benefits is one which can be justified by a state policy of neutrality in labor disputes, whether that policy is in this context required by federal law or merely a state-adopted goal, are, as the district court held, completely unconvincing.[21] (App. 58.) For example, the argument that "granting of benefits to workers unemployed due to a labor dispute would place the employer in an unfair negotiating posture" is premised on the assumption that "[t]he economic advantage would go to the union who could limit and preserve its strike funds," (Br. for Appellants, at 14) and that therefore "the employer [would be] forced to subsidize a strike against himself." (*Id.*, at 23.) While this explanation would suffice to demonstrate that the exclusion of members of a striking union does not violate the equal protection clause, it is entirely unpersuasive with regard to persons who are *not* on strike, have no active labor dispute with the employer, and are not members of the union which is on strike; since such persons are not on strike, they will not receive strike fund payments if such are available through their union, and they have no means of affecting the outcome of the labor dispute. The further sugges-

[21] Appellant acknowledges that pursuit of this interest was not in fact the chief reason the Ohio legislature adopted the provision in question. Br. for Appellants, at 23.

tions that there will be an effect on the dispute through "the psychological reinforcement of knowing that their co-workers in sister unions * * * will not suffer," and that there is a "probability of collusion between unions co-existing at the same functionally integrated establishment" (*Id.*, at 23-24), ignores reality. For example, members of the *Hodory* class were not "co-workers" of the striking mine employees in any meaningful sense; they were employed hundreds of miles away, in a different industry. Nor, for the same reason, did the Steelworkers' locals "coexist" with the Mineworkers' locals in any manner likely to lead to cooperation in a labor dispute. In fact, while the sort of "collusion" feared is not specified, it is hard to imagine in what sense a determination to continue to work despite a strike by another union against a common employer could be the result of "collusion" with that union.

CONCLUSION

For the reasons stated above, this Court should consider whether the judgment below should be vacated and the three-judge district court directed to retain jurisdiction pending determination of uncertain questions of state law by the state courts. If this course is not followed, the judgment below should be affirmed.

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